8-29-88
Vol. 53 No. 167
Pages 32883-33096

federal register

Monday
August 29, 1988

Briefings on How To Use the Federal Register—
For information on briefings in Washington, DC, and Chicago, IL, see announcement on the inside cover of this issue.

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WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

WHEN: September 13; at 9:00 a.m.
WHERE: Office of the Federal Register,
First Floor Conference Room,
1100 L Street NW., Washington, DC
RESERVATIONS: Doris Tucker, 202–523–3419

CHICAGO, IL

WHEN: September 19; at 9:15 a.m.
WHERE: Room 3320,
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230 S. Dearborn St.,
Chicago, IL
RESERVATIONS: Call the Federal Information Center,
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Presidential Documents

Title 3—

The President

Proclamation 5848 of August 22, 1988

Neurofibromatosis Awareness Month, 1989

By the President of the United States of America

A Proclamation

Neurofibromatosis is a potentially debilitating genetic disorder that causes tumors to develop in nervous system tissues. It affects one in 3,700 Americans. There are two known types of neurofibromatosis. The great majority of patients have NF–1, characterized by six or more dark patches on the skin and by tumors on peripheral nerves. The tumors can be severely disfiguring and painful and can also result in bone deformations and visual impairment. In the less common NF–2, tumors occur within the central nervous system, usually damaging nerves crucial to hearing and balance.

Individuals with neurofibromatosis, their families, and the health professionals who help them can all benefit from new guidelines for the diagnosis and management of this condition developed last year in a consensus conference at the National Institutes of Health. At the conference, scientists studying the genetics of neurofibromatosis presented particularly encouraging findings: They have determined that the gene defect that causes NF–1 lies on chromosome 17, and the defect for NF–2 on chromosome 22. These discoveries, medical experts agree, should soon lead to the development of diagnostic tests capable of definitively detecting neurofibromatosis gene carriers. As more is learned about the genetic defects in neurofibromatosis, scientists will be better able to design treatment strategies to assist those afflicted.

Private voluntary health agencies, chiefly the National Neurofibromatosis Foundation, are partners with the National Institute of Neurological and Communicative Disorders and Stroke in the fight against this tragic disorder. Countless families have been sustained and encouraged by support groups established by these agencies in most large American cities. These agencies also play an essential role in informing the health care professions and the general public about neurofibromatosis, about the needs of patients and families, and about the positive actions we can all undertake to ease their burdens.

To enhance public awareness of neurofibromatosis, the Congress, by House Joint Resolution 417, has designated May 1989 as "Neurofibromatosis Awareness Month" and authorized and requested the President to issue a proclamation in observance of that occasion.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim May 1989 as Neurofibromatosis Awareness Month. I call upon the people of the United States to observe this month with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of August, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 88-19715
Filed 8-25-88; 5:12 pm]
Billing code 3195-01-M

Presidential Documents

Proclamation 5849 of August 25, 1988

National Drive for Life Weekend, 1988

By the President of the United States of America

A Proclamation

Deaths from drunk driving on America's highways occur every hour of every day throughout the year. On average, someone is killed every 22 minutes, 65 people a day. Almost 24,000 people lost their lives last year in crashes involving alcohol.

These are not remote statistics. Two out of every five individuals in the United States will be involved in an alcohol-related crash at some time during their lives. Each of us is therefore a potential victim.

Our risk is greater on weekends, when alcohol consumption is heavier, and greatest on holiday weekends. We must remember, as we celebrate, that alcohol can turn a holiday into a tragedy. The responsibility belongs to each of us to see that this does not happen.

If we can begin with a single step, a single weekend, on which each of us can make a commitment not to drink and drive, it may be that we can demonstrate how individual commitments can produce life-saving results nationwide. Last year, a coalition headed by Mothers Against Drunk Driving sponsored the first National Drive for Life Day, campaigning for all Americans to pledge not to drink and drive on that day. The success of that first day has prompted calls for an expanded campaign.

The Congress, by Senate Joint Resolution 350, has designated the Labor Day weekend beginning on September 3, 1988, as "National Drive for Life Weekend" and authorized and requested the President to issue a proclamation in observance of that weekend.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the Labor Day weekend beginning September 3, 1988, as National Drive for Life Weekend. I ask each American to help improve the safety of our highways by pledging not to drink and drive on that weekend. I call upon the Governors of the States, Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, and American Samoa, the Mayor of the District of Columbia, and the people of the United States to observe this weekend with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of August, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 88-19716
Filed 8-25-88; 5:12 pm]
Billing code 3195-01-M

Presidential Documents

Proclamation 5850 of August 25, 1988

Women's Equality Day, 1988

By the President of the United States of America

A Proclamation

Sixty-eight years ago, on August 26, 1920, the Nineteenth Amendment to the Constitution of the United States, granting women the right to vote, was ratified. The anniversary of this milestone is a fitting time to celebrate this achievement and to pay tribute to those who resolutely sought to secure this most basic right. It is also an appropriate time to reflect on the advances women have continued to make over the past seven decades in political participation and other areas, playing indispensable roles and offering leadership in family life, the economy, intellectual and artistic activity, business, the professions, and government.

On this day of historic significance, Americans everywhere should pause to salute women for their contributions to our land. Many have won a place in history and in the way we define ourselves as a people—for instance, Pocahontas and Sacagawea; Dolley Madison and Molly Pitcher; Sojourner Truth and Rosa Parks; Nellie Bly and Sally Ride; Helen Hayes and Kate Smith; Clara Barton and Clare Boothe Luce. They and countless other women, some widely known and many more known simply in family, village, office, or neighborhood, have helped make us and keep us a country both great and good.

Women continue to achieve. For instance, women's economic strides in recent years have been notable. More than 55 million women are now in the labor force, and women hold 60 percent of the more than 17 million new jobs created since 1982. Since November 1982, employment of women is up 19 percent. Many women hold high-paying managerial and professional jobs; women's entry into top management has grown greatly since 1980. Women's real median income grew more than 15 percent between 1981 and 1986. Women are starting small businesses at twice the rate of men, and the gap in wages is steadily closing.

Women's roles continue to grow in other areas, too, such as public service. In this Administration, 1,308 women have achieved senior policy-level positions, and, at all levels of government, 3,039 women have accepted at least one Presidential appointment. In just the first term of this Administration, 37 women served as Presidential assistants. During this Administration, 32 women have received lifetime appointments to the Federal judiciary, and one of them serves as a Supreme Court Justice. Four of the ten female Cabinet members in our entire history have served in this Administration.

On this day, let us recount women's accomplishments and celebrate. But let us also reaffirm, individually and as communities and a Nation, our determination to seek a future of increasing economic freedom, prosperity, and equal opportunity in which all our citizens can fully and freely develop their talents and reach for their dreams for the good of others.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim August 26, 1988, as Women's Equality Day. I call upon the people of the United States to observe this day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of August, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 88-19717
Filed 8-25-88; 5:14 pm]
Billing code 3195-01-M

Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88-ANE-25; Amdt. 39-5997]

Airworthiness Directives; Alexander Schleicher Models ASW-15 and ASW-15B Gliders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action publishes in the **Federal Register** and makes effective as to all persons an amendment adopting a new airworthiness directive (AD) which was previously made effective as to all known U.S. owners and operators of Schleicher Models ASW-15 and ASW-15B gliders by individual priority letters. The AD requires visual inspection of the wing spar on Schleicher Models ASW-15 and ASW-15B gliders; and a more detailed inspection prior to further flight if damage is suspected, and if damage is not suspected no later than December 31, 1988. If no damage is evident during the more detailed inspection, the aircraft may continue in service until the results of the core analysis are obtained, but no later than March 1, 1989. If no damage is confirmed, the aircraft may continue in service for a period up to 1 year at which time the more detailed inspection must be repeated.

Confirmed damage to the spar requires repair or replacement before further flight. The AD is needed to prevent failure of the wing spar which could result in the loss of the wing and consequent loss of the glider.

DATES: *Effective*—September 12, 1988, as to all persons except those persons to whom it was made immediately effective by priority letter AD 88-11-05, issued May 19, 1988, which contained this amendment.

Compliance—As required in the body of the AD.

Incorporation by Reference—Approved by the Director of the **Federal Register** as of September 12, 1988.

ADDRESSES: The technical information referenced in this amendment may be obtained from Eastern Sailplane, Heath Stage Route, Shelburne Falls, Massachusetts 01370, or Calistoga Soaring Center, 1546 Lincoln Avenue, Calistoga, California 94515; or may be examined at the Office of the Regional Counsel, Federal Aviation Administration, New England Region, Rules Docket No. 88-ANE-25, 12 New England Executive Park, Room 311, Burlington, Massachusetts 01803.

FOR FURTHER INFORMATION CONTACT: Mr. Munroe Dearing, Brussels Aircraft Certification Office, AEU-100, FAA, Europe, Africa, and Middle East Office, c/o American Embassy, 15 Rue de la Loi B-1040, Brussels, Belgium, telephone 513.38.30, extension 2710; or Mr. John J. Maher, New York Aircraft Certification Office, ANE-172, Engine and Propeller Directorate, Aircraft Certification Service, Federal Aviation Administration, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581; telephone (516) 791-6221.

SUPPLEMENTARY INFORMATION: On May 19, 1988, priority letter AD 88-11-05 was issued and made effective immediately to all known U.S. owners and operators of Schleicher Models ASW-15 and ASW-15B gliders. The AD provided for inspections and repair or replacement of the wing spar in accordance with instructions contained in Alexander Schleicher ASW-15 Technical Note (TN) No. 23, dated April 21, 1988. Compliance with TN No. 23 is required by Luftfahrt Bundesamt (LBA) AD 88-95 Schleicher, dated April 25, 1988. AD action was necessary to prevent failure of the wing spar and loss of a wing.

Since it was found that immediate corrective action was required, notice and public procedure thereon were impracticable and contrary to public interest, and good cause existed to make the AD effective immediately by individual letters issued May 19, 1988, to all known U.S. owners and operators of Schleicher Models ASW-15 and ASW-15B gliders. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to § 39.13 of Part 39 of the Federal Aviation Regulations to make it effective as to all persons.

The regulations set forth in this amendment are promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket, otherwise an evaluation or analysis is not required. A copy of it, when filed, may be obtained by contacting the person identified under the caption "**FOR FURTHER INFORMATION CONTACT**".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety, Incorporation by Reference.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration (FAA) amends Part 39 of the Federal Aviation Regulation (FAR) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding to § 39.13 the following new airworthiness directive (AD):

Alexander Schleicher: Applies to Schleicher Models ASW-15 and ASW-15B gliders certificated in all categories, including all conversions to motor gliders.

Compliance is required as indicated, unless already accomplished.

To prevent failure of the wing spar, which could result in loss of the gliders, accomplish the following:

(a) Before further flight, unless already accomplished, visually inspect the wing spar, using an endoscope or a suitable mirror and light, in accordance with Action paragraphs 1.1 through 1.3 of Alexander Schleicher ASW-15 Technical Note (TN) No. 23, dated April 21, 1988.

(b) A more comprehensive inspection as delineated in Action paragraphs 2.1, 2.2, 3, and 4 may be substituted for the inspection specified in Action paragraphs 1.1 thru 1.3.

(c) If damage is found during the inspection of paragraph (a), accomplish the more comprehensive inspection referred to in paragraph (b), before further flight.

(d) If no damage is found during the inspection of paragraph (a), the glider may be continued in service, but is required to have the more comprehensive inspection referred to in paragraph (b) accomplished prior to December 31, 1988, unless already accomplished. If no damage is evident during the comprehensive inspection, the aircraft, after Action paragraph 2.2 is accomplished, may continue in service until the core analysis results are obtained, but no later than March 1, 1989. If the core analysis shows no evidence of damage, the aircraft may continue in service.

(e) Repeat the inspection referred to in paragraph (b) at intervals not to exceed 1 year since the last such inspection; additional core samples need not be taken.

(f) Damage found during the more comprehensive inspections of paragraphs (b), (c), (d), or (e) requires repair or replacement of the wing spar before further flight. Any repair must be approved by the Manager, Brussels Aircraft Certification Office, Europe, Africa, and Middle East Office, FAA c/o American Embassy, 15 Rue de la Loi B-1040 Brussels, Belgium; or the Manager, New York Aircraft Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, Federal Aviation Administration, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581.

Note: The manufacturer has advised in TN No. 23 that upon submission of the results of the inspection he will provide instructions for either accomplishment of a repair or replacement of the wing spar.

(g) Upon request of an operator, an equivalent means of compliance with the requirements of this AD may be approved by the Manager, Brussels Aircraft Certification Office, or the Manager, New York Aircraft Certification Office.

(h) Upon submission of substantiating data by an owner or operator through an FAA Airworthiness Inspector, the Manager, Brussels Aircraft Certification Office, or the Manager, New York Aircraft Certification Office, may adjust the compliance time specified in this AD.

Alexander Schleicher TN No. 23, dated April 21, 1988, identified and described in this document, is incorporated herein and made a part hereof pursuant to 5 U.S.C. 552(a)(1). All persons affected by this directive who have not already received this document from the manufacturer may obtain copies upon request to Eastern Sailplane, Heath Stage Route, Shelburne Falls, Massachusetts 01370, or Calistoga Soaring Center, 1546 Lincoln Avenue, Calistoga, California 94515.

This document may also be examined at the Office of the Regional Counsel, Federal Aviation Administration, New England Region, Rules Docket No. 88-ANE-25, 12 New England Executive Park, Room 311, Burlington, Massachusetts 01803, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday except Federal holidays.

This amendment becomes effective September 12, 1988, as to all persons except those persons to whom it was made immediately effective by individual priority letter AD 88-11-05, issued May 19, 1988, which contained this amendment.

Issued in Washington, DC, on August 8, 1988.

Thomas E. McSweeny,

Acting Director, Office of Airworthiness.

[FR Doc. 88-19492 Filed 8-26-88; 8:45 am]

BILLING CODE 4910-13-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 202

[Release Nos. 33-6795; 34-26018; 35-24703; 39-2180; IC-16534; IA-1138]

Temporary Lockbox Rule

AGENCY: Securities and Exchange Commission.

ACTION: Extension of temporary rule.

SUMMARY: The Commission is extending for two years the effectiveness of a temporary rule, adopted in June, 1984, which permits filing and other fees to be remitted to a U.S. Treasury designated lockbox depository located in Pittsburgh, Pennsylvania. This action will permit registrants to continue to use the procedures specified by the temporary rule pending the Commission's consideration of whether to adopt additional amendments to the Rule. In a related release, the staff shortly will be proposing an amendment to temporary Rule 202.3a that will permit filers to submit fees to a depository at the Bank of America and will instruct filers on how to use standard banking language when providing the required data elements for wire transfer of funds to both depositories.

EFFECTIVE DATE: September 1, 1988 through September 1, 1990.

FOR FURTHER INFORMATION CONTACT: Jeanne G. Hartford, EDGAR Counsel, (202-272-3808) Office of EDGAR Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: In Securities Act Release No. 6540, dated June 30, 1984 [49 FR 27306], the Commission adopted a temporary amendment to Rule 202.3a, to permit filing and other fees to be remitted to a lockbox depository. Under this amendment, filers may continue to submit filing and other fees to the Commission or may transmit required fees to a lockbox depository in Pittsburgh, Pennsylvania, by mail, wire transfer, or hand delivery. When the temporary amendments were adopted, the Commission stated that in approximately twelve months it would consider whether to eliminate payment of fees directly to the Commission and instead mandate payment of fees to a lockbox. The effectiveness of the temporary rule has been extended on three previous occasions, February 3, 1986 (51 FR 4106), November 10, 1986 (51 FR 40791), and September 4, 1987 (52 FR 33796). In addition, in January 1986, amendments to Rule 202.3a were proposed which would change its provisions from permissive to mandatory (51 FR 6267). Commentators have raised concerns about the availability of a west coast depository and have questioned the appropriateness of a mandatory lockbox requirement. In addition, the Commission is concerned that recent changes to its financial accounting system may necessitate certain changes to the lockbox proposal. Accordingly, pending its decision concerning whether to adopt certain proposed changes, the Commission has determined that the effectiveness of temporary Rule 202.3a should be extended for a period of two years (until September 1, 1990) to permit the continuation of existing procedures.

Administrative Procedure Act

The Commission finds, in accordance with the Administrative Procedure Act, 5 U.S.C. 553 (b)(A), that temporary Rule 202.3a relates solely to agency organization, procedure or practice and, therefore, advance notice and opportunity for comment is unnecessary in connection with this action.

§ 202.3a [Amended]

PART 202—AMENDED

Accordingly, the effectiveness of 17 CFR 202.3a is extended from September 1, 1988 through September 1, 1990.

By the Commission.

Jonathan G. Katz,

Secretary.

Date: August 23, 1988.

[FR Doc. 88-19519 Filed 8-26-88; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 154, 157, 260, 284, 385, and 388

[Docket No. RM87-17-001]

Natural Gas Data Collection System; Notice of Implementation Conference

August 23, 1988.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of implementation conference.

SUMMARY: In Order No. 493, issued April 5, 1988 (53 FR 15023 (April 27, 1988)) the Federal Energy Regulatory Commission (Commission) amended its regulations to require natural gas companies to file on electronic medium certain forms, rate filings, certificate applications and tariffs. On August 1, 1988, the Commission issued Order No. 493–A, 53 FR 30027 (August 10, 1988), extending the implementation dates for electronic data submission of FERC Form No. 8 to November 30, 1988, FERC Form No. 11 to November 30, 1988, and FERC Form No. 16 to April 30, 1989. Order No. 493–A also stayed implementation of electronic data submission of rate, tariff and certificate applications until March 31, 1989. This notice provides the implementation conference schedule and agenda for Order No. 493. Finally, Commission staff responses to technical questions on electronic data submission of rates, tariffs and certificates are attached to this notice as Appendix A.

DATES: The conference will be held on Monday and Tuesday, September 12 and 13, 1988, at 10:00 a.m. Requests to participate should be directed to the Commission no later than September 5, 1988.

ADDRESSES: The implementation conference will be held at: Hearing Room A, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426.

Requests to participate and questions regarding participation should be directed to: Brooks Carter, Office of Pipeline and Producer Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357–8995.

FOR FURTHER INFORMATION CONTACT: Brooks Carter, Office of Pipeline and Producer Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357–8995.

SUPPLEMENTARY INFORMATION: The Commission staff will first discuss general issues related to filings on electronic medium followed by specific discussions on the record formats for each form or filing. The following agenda lists the order of discussion. Anyone interested in participating at the implementation conference should contact the Commission by September 5, 1988. At that time, in addition to the items on the agenda, participants may submit questions or suggest additional topics for discussion.

Lois D. Cashell,

Acting Secretary.

Order No. 493 Implementation Conference Agenda

September 12–13, 1988, Washington, DC

A. General Topics
  1. Waiver Policy
  2. Submittal of Filings
  3. FERC Receipt and Processing
  4. Edit Checks
  5. Criteria for Acceptance or Rejection of Electronic Filings
  6. Updates/Revisions
  7. Notices/Service Lists/Public Access
  8. Confidentiality
  9. Other Issues
B. Monthly and Semiannual Forms
  1. FERC Form 8
  2. FERC Form 11
  3. FERC Form 16
C. Annual Forms
  1. FERC Form 2
  2. FERC Form 2A
  3. FERC Form 14
  4. FERC Form 15
D. Nonperiodic Filings
  1. Rate Filings
  2. Tariffs
  3. Certificate Applications

Appendix A—Responses to Technical Questions on Electronic Data Submission of Rate, Tariff and Certificate Applications in Docket No. RM87–17–001

A. General Questions

Some applicants request the Commission to allow natural gas companies to file the text for rate cases and certificate applications on word processing disks.[1] INGAA and Transco propose that natural gas companies should be permitted to submit certificate filings on floppy disks created by the natural gas company's existing word processing system. According to INGAA and Transco, Commission staff would then use its own computer software to put the natural gas company's data into the electronic format desired by the Commission.

Commission staff will accept text only files recorded in the ASCII Character set. To the extent natural gas companies file text data on PC diskettes, they may use an ASCII file. Additionally, since the Commission is staying implementation of the electronic filing of rates, tariffs and certificates, staff will consider acceptable methods for handling text data at the implementation conference.

Some applicants also argue that the Commission should not require natural gas companies to submit material incorporated by reference on an electronic medium.[2]

Order No. 493 specifically excludes certain exhibits, such as executed service agreements, maps and diagrams, from the electronic data submission requirement. Staff believes that filing all other materials incorporated by reference in rate and certificate filings is necessary for the efficient processing of these filings on an electronic medium.

ANR & CIG request the Commission to clarify whether compliance filings pursuant to a Commission suspension order will be subject to the electronic data submission requirement of Order No. 493.

Compliance filings must be made on an electronic medium. Otherwise the Commission's data base would contain incorrect, incomplete, or out of date information.

B. Rate Filings

The Commission staff notes that some applicants for rehearing argue that a number of the record formats for rate filings contain new reporting requirements. Staff has carefully reviewed these comments. To the extent that the record formats contain new data elements, the Commission staff will delete those requirements. Staff points out, however, that the Commission's regulations for rate filings in § 154.63 contain numerous specific data that natural gas companies must include in a rate filing. The record formats are designed to include all of the data requirements currently specified in § 154.63 of the regulations.

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[1] *See, e.g.,* Algonquin, Enron, INGAA and Transco.

[2] *See e.g.,* ANR & CIG, Enron and Northwest.

In the past, natural gas companies have submitted rate filings with varying amounts of data. Some companies have supplied data in greater detail than is required by § 154.63. In fact, several commenters have stated that the record formats do not provide sufficient space to file all of the data they routinely submit. Additionally, certain companies' accounting systems provide a more detailed breakdown of costs than others. In designing these formats, the Commission staff has attempted to accommodate these companies by providing for details. Some pipelines have expressed concern in their comments that they will be required to file this additional information because it has been included in the formats. This is not staff's intent. Certain data elements in the formats are optional and are not required by Order No. 493 to be submitted by each company. In the discussion of the technical questions the Commission staff has indicated those details that are not mandatory.

1. Statement A

ANR & CIG argue that in Record 03, Character Positions 11 and 24, it is not clear whether it is intended that each cost item referred to in the Cost Classifications (Char. Pos. 11) will be functionally classified, or whether it is acceptable to report each cost item only in total for all functions. ANR & CIG argue it is not logical to report total costs broken down by functional classification when a number of the supporting record formats do not require the functional breakdown of costs.

The Commission staff agrees with ANR & CIG that functional classifications on this statement are optional. However, function codes have been included since some pipelines have traditionally provided the functional classification in Statement A.

2. Statement B

Northwest argues that Record 04 is not compatible with Northwest's current presentation methodology for Statement B. According to Northwest, the cost of some items reported on this statement is amortized over time, and detailed by project. The record format does not allow for detailing account balances. In fact, there does not appear to be enough space available in the format to contain the information presented in Northwest's rate filings. Furthermore, Northwest does not report certain items called for by other portions of this record format, and much of the information to be reported is not collected in the manner required.

The Commission staff has provided a footnote record so that more detailed information can be reported along with explanations of why certain items are not reported. Northwest may raise any concerns about the specific data items in Schedule B at the implementation conference.

3. Statement C

Northwest states that there is a wording difference between Record 05 and what it currently files in Statement C. Northwest believes that the meaning of "Reductions" (Character Positions 43–54) is unclear and that "Retirement" should be substituted.

The Commission staff notes that "Reductions" is the term used in § 154.63(f) and that same term was used in the record formats.

a. Schedule C–1. Northwest comments that it uses subfunctions under functional classifications that are not identified in Record 06. Northwest asks if they should provide separate subfunction totals and, if so, where, or should they provide an aggregate subfunction total.

The Commission staff suggests that the footnote record is one alternative for the subfunctions. However, certain pipelines may need additional free form or formatted records to report plant allocation. Staff will consider this issue at the implementation conference.

ANR & CIG point out that in Record 06, Character Positions 20–25, it is not clear what is meant by the statement "A Reference Is Needed".

The Commission staff notes that the reference refers to the detailed Gas Plant Account itemized in Character Positions 26–70.

United notes that on Record 06 the data item "Detailed Plant Account Number" is defined as a 6-character numeric field. United asks how a company can enter an account number with a decimal, *i.e.*, 108.1. United questions whether there is an implied decimal and whether the field is to be right or left justified and filled with zeros.

The Commission staff intends all account number fields to be 7-character numeric fields. Record 06 will be revised accordingly, and will then be consistent with General Instruction 9. Account numbers should be right justified.

b. *Schedule C–2.* ANR & CIG note that in Record 07, Character Positions 53–55 are used twice, which does not allow for the inclusion of the requested data. In addition, in Record 08, Character Positions 53–55 are assigned to the "Project Code" and Character Positions 13–144 are assigned to the "Description of Plant Addition or Retirement Projects." The commenters state that either one or both should be reassigned correct character positions. United also points out that there is no Data Sensitivity Indicator on Record 08.

The Commission staff will correct the record formats in response to these concerns.

c. *Schedule C–4.* Northwest and Texas Eastern argue that the format for Schedule C–4 (Record 10) looks much like the format for Schedule E–2 (Record 17), and questions whether this is a duplication.

The Commission staff is revising the record format for Schedule C–4 to coincide with the requirements of § 154.63(f) for that schedule.

3. Statement D

United points out that in Record 12 for Statement D, the technical specification layout requires a lower level of detail on such items as retirements, cost of removal, salvage, and reimbursement than is currently available at United. According to United, General Plant Depreciation associated with computer equipment is not currently tracked at the level requested. United also argues that supporting statements for Test Period and Normalized Depreciation are not included.

The Commission staff notes that the record format allows for the data to be broken down by the indicated categories if available. However, it is not mandatory that the data be reported in such detail for each of these items. The supporting statements for test period and normalized depreciation may be discussed at the implementation conference.

Northwest argues that its computer accounting system does not separate "Adjustments and Reimbursements" (item 47) and "Other Debits and Credits" (item 48).

The Commission staff will permit Item 48 to be used for adjustments and reimbursements.

4. Statement E

a. Schedule E–1:

Northwest indicates there is no place in the Statement E–1 record formats (Records 15 and 16) for extracted products balances. This information is currently reported, and Northwest asks if there is a reason for its exclusion.

In response, the Commission staff will add a code for products extraction to Records 14, 15 and 16.

According to ANR & CIG, in Record 16, Character Positions 11–12 require base period functionalization of all Schedule E working capital components. CIG notes that it currently does not account for these working capital components on a functional basis. In addition, they note that some working capital components are allocated to functions.

The Commission staff agrees that pipelines are not required by the regulations to provide base period functionalization on Schedule E–1. However, because this information is sometimes provided by pipelines on a functional basis, Record 16 provides pipelines the opportunity to continue to report on this basis.

b. Schedule E–3:

United notes that on Record 18, "Beginning Storage Balance" is repeated and "Beginning Storage Balance Amount" and "Ending Storage Volume" are missing. United also points out that it does not utilize the LIFO method of storage accounting shown in Record 18.

The Commission staff will revise Record 18 to reflect the following data items: Beginning Storage Volume, Beginning Storage Amount, Beginning Storage Date, Ending Storage Volume, Ending Storage Amount, and Ending Storage Date. Staff will also revise this record to permit other methods of storage accounting.

5. Statement F(2)

Northwest states that in the past it has reported capitalization in three different ways: (1) incremental pre-build capitalization; (2) net of pre-build capitalization; and (3) total capitalization. They ask which one should be reported on Record 22.

The Commission staff will expand the record to allow for multiple presentations.

6. Statement F(3)

Northwest argues that there is no code or definition for the term "Subissue Identification Code".

The Commission staff intends that natural gas companies use this code to identify several issues (on different dates) of a single debt instrument. Staff will revise the codes and definitions on this record to clarify this item.

7. Statement F(3)(g)

ANR & CIG argue that in Record 25, Character Positions 70–73, natural gas companies have not been required to furnish the information on a "mmyy" basis. They point out that pipelines have typically furnished this information in total by debt instrument for the entire year of reacquisition. In addition, they argue that it would be extremely burdensome to report this information when it is not used or useful in the overall calculation of the amortized gains and/or losses on reacquired debt.

Staff notes that the Commission's regulations in § 154.63(f) for Statement F(3)(g) require that the data be provided on an annual basis, not on a monthly basis. Consequently, natural gas companies may, but are not required, to file the data on a monthly basis.

ANR & CIG claim that in Record 25, Character Positions 140–147, both the item description, "Total Gain/Loss * * *" and the comments, "amount, $ * * *" are ambiguous in their requirements. They request clarification.

The Commission staff intends that any gain/loss associated with early debt retirements should be included in the summary data, in addition to the gain/loss associated with currently outstanding debt instruments that are paid off at their scheduled maturity.

8. Statement F(4)

ANR & CIG argue that the format for Record 26 does not provide for the inclusion of the reacquisitions and amortization of gains or losses associated with reacquired preferred stock.

The Commission staff points out that this data is not specifically required in § 154.63 of the Commission's regulations for Statement F(4). However, ANR & CIG may raise this issue at the implementation conference.

9. Statement F(5)(4/5)

ANR & CIG argue that in Record 32, Character Positions 76–83 do not provide for the inclusion of additional items such as "Lease Rentals" and "Amortization of Debt Premium Discount and Expense."

The Commission staff responds that amortization of debt premium discounts and expenses should be reflected in the interest shown in Item 222, "Interest on Debt." Normally, lease interest expenses are not used by pipelines to calculate the interest coverage. However, a pipeline may include a separate calculation including lease interest expenses in a footnote for this statement. These issues can be discussed in more detail at the implementation conference.

10. Statement F(6)

Northwest points out that there has been a proposed rulemaking issued in Docket No. RM88–18–000, and that a final rule will have an impact on Records 33 through 36 and upon Form 2 as well. Northwest suggests postponing implementation of Statement F(6) and Form 2 until after a final rule is issued in order to avoid duplication of effort.

The Commission staff is aware that a final rule in Docket No. RM88–18–000 will have an impact on Statement F(6) and FERC Form No. 2. However, staff does not believe that the Commission should postpone implementation of this statement or FERC Form No. 2. Revised record formats will be issued whenever any final rule affects the reporting requirements.

11. Statement G

Northwest argues that Statement G (Records 37 through 49) does not provide the typical statement breakout. Because there are no subheadings and the record formats are collectively referred to as "Statement G", it is more difficult to decipher than the other statements.

The Commission staff notes that the regulations do not specify a breakout for Statement G as they do for certain other schedules. The Commission staff invites further discussion of the format of Statement G at the implementation conference.

ANR & CIG and Texas Eastern claim that in Record 37, "Points of Delivery" (Character Positions 96–125), is a new requirement since pipelines have never been required to identify the name of the delivery point for each jurisdictional customer. ANR & CIG believe the Commission must provide the justification for requiring this information. ANR & CIG also argue that some of this data may not be readily available. Texas Eastern also argues that a considerable increase in the amount of data previously provided is now required. Texas Eastern notes that the proposed format requests Maximum Single Day Delivery in each month by delivery point. According to Texas Eastern, this was required in the previous Statement G but was in no way tied to a specific delivery point. United states that date and volume data items are not available and daily volumes are not currently available for all measuring points.

The Commission staff notes that Statement G requires that the data for each customer will be shown by delivery point in the absence of conjunctive billing. In cases where there is conjunctive billing for deliveries at more than one point, the data can be grouped for the customer and the multiple delivery points listed.

ANR & CIG state that in Record 37, Character Positions 184–191 and 204–211, it is not clear whether these fields are to be used to report both demand and commodity rates. Also, ANR & CIG argue that "Sales Rate" needs to be defined and clarified as to the intent and usefulness of this data.

This record will be used for both demand and commodity rates. The

Commission staff expects the pipeline to state in Item 309, "Volume Billing Determinant Name", whether it is reporting demand or commodity rates. Staff also notes that the information required in Record 37 is described in § 154.63(f), Statement G, paragraphs (a) and (b). "Sales Rate" refers to the presently effective and proposed rates, both demand and commodity, used to compute revenues. The pipeline will also state whether the data are for the base period or test period in Item 302.

United points out that Records 38 and 41 are "footnote" records which refer back to Records 37 and 39, respectively, and give explanations of adjustments to base period volumes for each customer. According to United, this is not currently filed or prepared.

The Commission staff notes that in § 154.63(f), Statement G requires: "Adjustments to actual period sales volumes, jurisdictional and nonjurisdictional, shall be fully and clearly explained including reference to any certificate docket authorizing changes in sales." The pipeline may use the same footnote for more than one customer if the adjustments are for the same reason.

United also indicates that the information in Record 39 is not currently filed because Nonjurisdictional Sales Volumes and Revenue should not be reported to the Commission.

The Commission staff notes that the only data required for nonjurisdictional sales is the total volume and revenue. These data are necessary to allocate costs between jurisdictional and nonjurisdictional customers. Staff also notes that under § 154.63(f), Statement G requires that "Sales and services and the related volumes shall be classified as between jurisdictional and nonjurisdictional." Furthermore, paragraphs (a) and (b) under Statement G require the pipeline to provide annual revenues (actual and projected) from nonjurisdictional sales.

United points out that on Record 43, "Fuel Used at Plant" is not currently filed and is not available.

The Commission staff agrees that this information is not currently required and will delete "Fuel Used at Plant" from Record 43.

Also in Record 43, United requests that the Commission clarify "Field Code of Product." United questions whether this is really product code or field code.

The Commission staff will revise Record 43 to replace "Field Code of Product" with "Location of Processing Plant." Respondents will provide the FIPS code of the state and the name of the county or parish for each processing plant.

ANR & CIG note that in Record 43, Character Positions 104–125 require monthly Btu content of the inlet and outlet gas at all processing plants by month. They point out that current regulations require only annual reporting of inlet and outlet volumes.

The Commission staff agrees that Statement G requires that the Btu content be provided on an annual basis, not on a monthly basis. Pipelines may submit data on a monthly basis, but they are not required to do so.

ANR & CIG argue that in Record 45, Character Positions 61–152 require reporting of purchasers' names. According to ANR & CIG, current regulations do not require such reporting.

The Commission staff agrees that purchaser names are not required. Those items will be deleted from the format for Record 45.

United points out that in Record 45, data currently is not required at the same level of detail as in § 154.63. According to United, the technical specifications require monthly volumes and dollars, whereas United provides dollars only for the base period total.

The Commission staff has constructed the record format to allow monthly reporting. However, data on Record 45 does not have to be reported on a monthly basis. It is sufficient to provide total data for the base period and for the test period.

United notes that in Record 47, it currently does not provide monthly volumes and dollars for this filing; only base period totals for dollars are provided.

The Commission staff notes that volumes are not required in the format for Record 47. Although the record format allows data to be reported on a monthly basis, applicants may provide total data only.

United points out that in Record 48, the technical specifications provide a total indicator for reporting base period totals. United notes, however, that Record 49 is also a total record for this account and is redundant. United also notes that the well number is not provided on the existing schedule. ANR & CIG also note that in Record 49, Character Positions 60–94 are not identified. In a related comment, Texas Eastern states that the new page 111 (Record 49) is not a logical continuation of the old page 110.

The Commission staff agrees that Record 49 is duplicative and it will be deleted. In addition, the regulations do not require the reporting of well number. Therefore, that item will be deleted from Record 48.

12. Statement H(1)

United points out that on Record 50, the Account Number comments say "SEE EXHIBIT." United asks for clarification.

The Commission staff notes that an exhibit was omitted from the record formats for rate filings. This exhibit should have contained the accounts and account numbers for Operation and Maintenance expenses. This exhibit will be added to the corrected record formats. Account numbers should be right justified.

a. Schedule H(1)–3: Northwest argues that the format for Record 55 does not provide fields for accumulated data and is expressed in text rather than numbers. Northwest questions whether text is an useful as numerical information.

The Commission staff responds that since this record is for working papers, a text format was specified so the respondent could use a free-format. It is anticipated that most of the data provided by the respondent will be numerical and will include accumulated data. The format for this schedule can be discussed at the implementation conference if natural gas companies want more standardization.

Northwest argues that Schedule H(1)–3h is a very long spread sheet containing twelve months of data and will not fit in the 133 character positions allowed for Schedule H(1)–3. Northwest asks if it's possible to wrap the data to a new line or, alternatively, to use filler positions for the overflow data.

The Commission staff designed the record layout in text format so the data can be wrapped. Northwest and other participants may propose a more appropriate format at the implementation conference.

13. Statement H(2)

ANR & CIG argue that in Record 59, Character Positions 82–87 require the Percent Functionalized. According to ANR & CIG, current regulations do not require this information and it is neither useful nor meaningful.

The Commission staff notes that Percent Functionalized is a mathematical calculation derived from other data provided in Record 59. Specifically, it is the Amount Functionalized (Char. Pos. 88–99) divided by the As Adjusted Amount (Char. Pos. 68–79).

United points out that the Account Number is not currently reported and is not available at this level. In addition, General Plant Depreciation associated with computer equipment is not tracked at this level. United also states that the current schedule does not include the annual depreciation rate, and that Functionalization, Percent Functionalized, and Amount Functionalized are not currently available.

The Commission staff notes that the account number requested is the depreciation account, not the plant account, and is currently reported. Also, if the pipeline does not have the data associated with computer equipment at this level of detail, it doesn't have to provide it. Statement H–2 requires an explanation of the methods used and the computations for the derivation of the unit rates for depreciation. Thus, the current depreciation rate should be provided. Finally, Statement H(2) requires the data to be shown by function and certain data to be further classified as between onshore and offshore facilities.

a. *Schedule H(2)–1:* Northwest argues that Record 58 lacks functions and functionalization code descriptions.

The Commission staff notes that the regulations call for the reconciliation of depreciable plant in Statement H(2) and the aggregate investment in gas plant shown in Statement C. Thus, staff does not believe that functions are required to be shown on this schedule.

Schedule H(3): ANR & CIG argue that in Record 60, Character Positions 120–131 require the reporting of an item called "Allowance for Federal Tax", in addition to "Federal Income Tax", "Deferred Federal Tax" and "Current Federal Tax." They point out that the Commission has not defined what is meant by "Allowance for Federal Tax." In addition, ANR & CIG note that Record 60 does not include a data item for the inclusion of city taxes.

The Commission staff responds that the "Allowance for Federal Tax" is the sum of the current and deferred federal income taxes. As such, it duplicates "Federal Income Tax" (Char. Pos. 84–95). The item "Federal Income Tax" will be relabeled "Allowance for Federal Tax" and Character Positions 120–131 will be deleted. The Commission staff will also expand the data element for state taxes to include state and local taxes and will make a similar revision to the information to be reported in Record 61 under Text ID 4.

a. *Schedule H(3)–6.* Northwest, ANR & CIG note that Schedule H(3)–6 is missing from the record formats. Northwest wonders whether its absence is intentional or whether the data has been incorporated elsewhere.

The Commission staff notes that this data should have a separate record format which will be provided in the revised formats.

15. Statement H(4)

ANR & CIG state that in Record 62, Character Positions 24–25, it is not clear whether it is intended that each tax type requested in Character Positions 12–23 be identified by state. ANR & CIG claim that this is a new requirement which will require some additional recordkeeping by the pipelines. According to ANR & CIG, the Commission should explain why this additional information is required.

The Commission staff disagrees. The regulations at 18 CFR § 154.63(f) for Statement H–4 provide that "The taxes shall be shown by states and by kind of taxes."

16. Statement I

ANR & CIG point out that in Record ID 65, Character Position 11 is used twice.

The Commission staff will correct the record format.

a. *Schedules I–1, I–2, and I–3:* United, ANR & CIG state that Schedules I–1, I–2 and I–3 are missing from the automated format. United also notes that Statement I (Record 64) is a *text* Record but asks for details of *Statement I, Schedule I–1,* and *Schedule I–2.* United further notes that the numbers (costs) associated with these schedules are not requested on a record layout.

The Commission staff confirms that specific record formats for Schedules I–1, I–2 and I–3 were not included in the automated formats. Staff intended that natural gas companies use Records 64 and 65 for filing the information on those schedules. The Commission staff believes it would be difficult to devise a standardized format due to reporting variations among pipelines. However, in view of United's comment, staff will consider alternative formats for these schedules at the implementation conference.

b. *Schedule I–4:* ANR & CIG state that in Record 66, Character Positions 229–242, it is not clear whether this reporting requirement is applicable to base period volumes or test period volumes or both.

The Commission staff clarifies that the temperature and pressure base specified for those character positions in Schedule I–4 apply only to the test period.

c. *Schedule I–6:* ANR & CIG claim that in Record 68, Character Position 38, the term "Nature of Service" is a new requirement and the Commission should explain why it is required.

The Commission staff does not agree that this is a new requirement. The regulations for Schedule I–6 in 18 CFR 154.63(f) require "* * * deliveries during the winter heating season within the twelve months of actual experience, classified as between firm, interruptible, exchange, transportation, gasoline plants, emergency, etc."

ANR & CIG note that, in Record 68, Character Positions 11–16 and 101 are missing.

The Commission staff will correct the error by reassigning character positions.

ANR & CIG note that in Record 68, Character Positions 102–136 require various peak day information. In addition, to the three continuous peak days, they note that the record requests the "Average Daily Delivery Volume" during the peak period. ANR & CIG request that the Commission clarify this term and explain why this new requirement should be added.

The Commission staff responds that this schedule should require an average of the volumes for the three days, not an average for each of the three days. Additionally, the adjustments are to the average of the three days, not to the total for the three days. Staff will issue revised formats to reflect these changes and clarifications.

d. *Schedule I–7:* Northwest notes that there is no code or definition for the term "Types of Service" in Statement I–7.

The Commission staff will correct this omission by adding appropriate codes and definitions.

ANR & CIG note that Records 69 and 70 appear to require the same data with the only exception being the layout of the record format.

The Commission staff agrees that the formats are duplicative. Record 70 will be deleted and codes to provide "totals" will be added to Record 69.

17. Statement K

Texas Eastern states that certain schedules such as Statement K, Schedule K–1, are too large to fit in the proposed formats.

The Commission staff notes that all records have a record length of 255 characters. However, 132 characters are provided for entering text data in Schedule K–1. Staff will consider alternatives to these record format parameters at the implementation conference.

18. Statement L

Northwest claims that it does not understand what "consolidation" and "non-consolidation" mean and requests further explanation. It also requests clarification as to whether Statement L requires submission of financial data from nonjurisdictional parents or affiliates. If so, Northwest objects to the requirement not only on the basis that the information is nonjurisdictional and beyond the reach of the Commission but also because Northwest and its parent do not have coordinated accounting systems. Northwest alleges that it will cost $50,000 to $75,000 to coordinate the systems and probably could not be completed within the allotted time. Northwest also argues that this record format requires much more information than is currently required.

The Commission staff notes that pipelines are required by § 154.63 of the regulations for Statement L to provide a balance sheet on a consolidated basis if the pipeline is a member of a system group of companies. Specific concerns regarding the level of detail for the consolidated balance sheet may be raised at the implementation conference.

ANR & CIG state that Records 77 through 96 for Statements L and M do not provide for filing the notes to the financial statements which are generally an integral part of the financial statements. ANR & CIG argue that if the notes are not necessary, then perhaps neither are the statements themselves.

The Commission staff agrees that notes to financial statements are an integral part of the statements and are also required by the regulations. Staff will consider an additional format(s) for this purpose after discussion at the implementation conference.

18. Statement M

Northwest states that its comments with respect to Statement L apply as well to Statement M.

The Commission staff notes that, as with Statement L, the regulations require an income statement on a consolidated basis if the pipeline is a member of a system group of companies. The level of detail for this income statement may be discussed at the implementation conference.

19. Statement N

ANR & CIG note that the Commission has omitted "code numbers" from Records 4 through 16, Schedule N-3, Working Capital.

The Commission staff will correct the Record ID errors.

a. *Schedule N-7:* ANR & CIG point out that, in Schedules N-7, N-8, N-10 and N-11, the character positions for "Item Data Sensitivity" and "Item Filler," are out of sequence. ANR & CIG also note that, in Statement N-7, Character Positions 11-56 are missing.

The Commission staff will revise the character positions to correct these errors.

ANR & CIG state that in Schedule N-7, Character Positions 81-92, "Interest and Debt" does not provide for any other adjustments to the taxable portion of return. They also request clarification of the definition of "Tax Adjustment Amount" in positions 105-116.

The Commission staff clarifies that "Tax Adjustment Amount" will include those other adjustments to the taxable portion of return which are not included in "Interest and Debt."

ANR & CIG also request clarification of the term "Taxable Portion."

The Commission staff defines "Taxable Portion" as the "Return" shown in Character Positions 69-80, less the "Interest and Debt"shown in Character Positions 81-92.

ANR & CIG point out that, in Character Positions 153-164, it is not clear whether "State Income Taxes" refers to deferred state income taxes or current state income taxes.

The Commission staff notes that "State Income Taxes" refers to current state income taxes. Staff also notes that a new item should be added for deferred state income taxes.

b. *Schedule N-9:* ANR & CIG point out that Character Positions 11-142 refer to a note which was not included.

The Commission staff will include a note in the record format for Schedule N-9 similar to the note in Record 75 for Schedule K-1.

c. *Schedule N-10:* ANR & CIG claim that in Statement N-10, Part 1, the "Point of Delivery" and "Max. Single Day Delivery in Month" are new requirements. According to ANR & CIG, the Commission should explain why this new requirement is necessary.

The Commission staff agrees that the regulations do not require the pipeline to provide the maximum single day delivery in the month and the point of delivery on this schedule. The information may be provided, but is not required.

In Schedule N-10, Part, 2 ANR & CIG request clarification of "Adjustments to Base Period Jurisdictional Sales Billing Determinants." They also request clarification of the term "Adjustment to Base Period Annual Field Sales Volume" in Part 3.

The Commission staff will revise the records so that these items reflect adjustments in volumes and revenues between the base and test periods.

ANR & CIG state that in Parts 2 and 3, the reason for requiring a "Line No." is not clear. ANR & CIG also note that in Parts 1, 2 and 3, certain character positions need to be renumbered.

The Commission staff will correct all character position errors and will delete the requirement to include a line number in Parts 2 and 3.

d. *Schedule N-11:* ANR & CIG request that the Commission clarify what is being requested by "monthly balance."

The Commission staff will issue a revised format for this schedule.

20. Footnotes

ANR & CIG state that in Schedule RB, Record 19, Character Positions 11-20, "Reference Number" should refer to General Instruction 8.

The Commission staff notes that General Instruction 7 is the correct reference for "Reference Number." The Footnote Record will be revised accordingly.

United notes that on the Footnote Record, the Reference Number is 10 characters; however, the definition in General Instruction 5 requires 13 characters.

The Commission noted in Order 493-A that the footnote record for all formats was inconsistent with the General Instructions. The footnote record will be revised in accordance with Order 493-A.

21. Other General Comments

Texas Eastern indicates that all control data should precede text data and that as much space as possible, up to a maximum of 255 characters per line, needs to be utilized for text.

The Commission staff notes that, with the exception of data sensitivity, all control data precedes text data. Staff has limited the text record lengths in order to accommodate all filers.

United objects to all Working Papers being included in automated filing. According to United, these are often manual records and not an official part of the filing.

The Commission staff notes that if working papers are included in a rate filing, then those working papers must be submitted on an electronic medium.

United points out that its Project Number is not numeric but the record format allows only numeric data. Also, United notes that the current field length is not long enough to accommodate its project numbers (requires six characters).

The Commission staff will modify the field length and definition to accommodate project numbers used by respondents. The requirements for the project number field will be discussed at the implementation conference.

United recommends inclusion of a generalized record format for supplemental schedules of new or different data from that outlined in specific formats.

At this time, the Commission has issued automated formats only for the data identified in § 154.64(f) of the regulations. The Commission staff recognizes that applicants also file supplemental data which is not covered by the existing automated formats. Staff will entertain specific recommendations on any additional formats for new or different data at the implementation conference.

United asks whether a Record ID need be generated if a statement or schedule is N/A.

The Commission staff does not intend that pipelines include any records in a filing for statements or schedules that are not applicable.

United points out that no means has been outlined to file alternative statements.

The Commission staff will permit pipelines to file alternative statements. A pipeline should designate the primary and alternate statements.

C. Tariffs

Texas Eastern notes that the tariff specification in the Tariff Sheet Identification record is labeled TF–01 and should be TF–02.

The Commission staff agrees and will revise the record indentification. In the following comments Record 02 will refer to the Tariff Sheet Identification record format.

Northwest and United filed separate comments requesting modifications of the item "Sheet Number" in Record 02. Both Northwest and United seek expansion of the field length from three characters. Northwest notes that Volume 2 of Northwest's current tariff contains 1634 pages; the current United tariff contains 2500 pages. In addition, United and Northwest note that the tariff sheet numbers sometimes contain alphabetic characters. Northwest points out that § 154.33(d)(2)(ii) of the Commission's regulations specifically provides that a sheet inserted between two consecutively numbered sheets will be marked with the appropriate number and letter indicating the insertion.

The Commission staff is aware that in addition to Northwest and United, several other pipelines have sheet numbers which exceed three character positions. In light of this fact, Commission staff will expand "Sheet Number" to six character positions. Further, staff will change this field from numeric to character in order to conform with § 154.33(d)(2)(ii) of the regulations.

Northwest requests clarification of several issues. First, Northwest questions whether a pipeline is required to file a complete schedule TF before it files any changes to individual sheets. Northwest cites Order 493, pages 6–7, which provides that:

> On or after September 30, 1988, natural gas companies filing rate changes, including the affected tariff sheets, * * * must make these applications using an electronic media.
>
> Additionally, on or after September 30, 1988, natural gas companies filing a general rate proceeding pursuant to section 4 of the NGA, or submitting a restatement of the * * * base tariff * * * must make a one-time only filing which resubmits the company's entire tariff, except for executed service agreements, on electronic media."

The Commission staff clarifies that pipelines are required to file individual sheets electronically prior to submitting the entire tariff.

Second, Northwest asks if a pipeline must file an entire Schedule TF each time it files a tariff change, or only those sheets that changed.

The Commission staff clarifies that only the affected tariff sheets need be filed on electronic medium when a pipeline's tariff volume is revised in part.

Third, if a pipeline is allowed to change a tariff by submitting a file containing only those sheets that changed, Northwest asks if the Record Cross-Reference (see specific instruction 10) should match the original filing of Records 02 and 03.

The Commission staff responds that a pipeline is allowed to change a tariff by submitting a file containing only those sheets that changed. However, the "Record Cross-Reference" is not intended to correspond to previously filed tariff sheets. it is intended to link information submitted on Records 02 and 03 relating to a single unique tariff sheet.

Finally, Northwest asks if it will have to rename its Volume No. 1–A tariff to comply with FERC's instruction that only numeric characters are used in the tariff volume number field provided in Record 02. Several other pipelines also use a Volume No. 1–A designation for their tariffs.

The Commission's regulations at § 154.33 govern the submittal of tariff volumes. Although the regulations provide for the submittal of multiple volumes, those volumes are to be numbered consecutively without the use of alphabetic characters. However, in the past, the Commission staff has permitted certain pipelines to number tariff volumes using alphabetic characters. In the interest of maintaining continuity in the Commission's tariff files, the item "Tariff Volume Number" on the Tariff Sheet Identification record will be changed from numeric to character. When the pipeline submits the replacement of the tariff in its entirety, the numbering of the tariff volumes should comply with § 154.33 of the regulations.

United questions how to distinguish "proposed revised tariff sheets" from "true effective tariff sheets." For example, according to United, proposed revisions submitted with a rate case will not be in effect until the rate case is "approved." According to United, there is no indicator on the records.

The Commission staff notes that all sheets filed by the company are considered proposed sheets until the Commission acts upon them. It will therefore be impossible for the company to file effective tariff sheets. The Commission staff intends to maintain the tariff sheets according to their status, *e.g.*, suspended subject to refund, pending Commission review, etc.

United notes that there is no provision for "alternative" tariff sheets.

The Commission staff will adjust the tariff schedule to accommodate the filing of alternative tariff sheets.

United objects to the technical specification reference to margin and border requirements under § 154.33. United argues that these will be meaningless on magnetic tape and are redundant due to format specifications.

The Commission staff responds that this rulemaking is not intended to make wholesale changes to the Commission's regulations regarding the format of the tariff sheets. The Commission staff intends to be able to print a copy of the tariff sheets in the format required by the regulations. Any significant change to the tariff sheet format would require another rulemaking.

United notes that certain tariff sheets have both horizontal and vertical text. United questions whether the FERC system can handle this.

The Commission staff recognizes that some companies currently have tariff sheets which are displayed both horizontally and vertically. However, the Commission staff hoped to avoid requiring the companies to totally rewrite the tariff by providing the latitude to file the tariff sheets as the sheets now appear.

United requests clarification on the initial one-time filing of the entire tariff. Specifically, in addition to general rate case filings, United questions how the one-time filing of the entire tariff will be triggered.

The Commission staff clarifies that the one-time filing of tariff sheets is designed to capture the entire tariff volume on the computer. The three year restatement of rates filing will also trigger the entire tariff refiling. Any other filing of the tariff volume in its entirety will occur for the same reasons these filings were triggered in the past, *e.g.*, a company name change.

United notes that the issued date is missing from Record 02 but is present as identifying information on existing tariff sheets. Similarly, in a separate comment, Texas Eastern argues that additional items are needed to designate "Issued By" and "Issued On."

The Commission staff notes that the information which these commenters wish to add to Record 02 already appears as part of the border information on Record 03 at character positions 18–149.

ANR & CIG point out that Schedule TF, page 3, states "* * * the Company should use only 72 character positions * * *" ANR & CIG argue that the important issue here is whether the tariff can be accepted with more than 72 character positions. According to ANR & CIG, if 72 characters are the limit, all CIG tariffs may have to be resubmitted. ANR & CIG argue that the Commission should be flexible and permit up to 255 characters. Texas Eastern argues that the number of characters should be increased to 240 and that the use of additional characters above 240 should be optional.

The Commission has not revised the regulations governing the presentation of the tariff sheets in this rulemaking. The tariff sheets must be placed on the tape or diskette in such a way that they may be printed in the format specified by the Commission's regulations.

ANR & CIG argue that the handling of numeric fields and dates within the "text" item is unclear in Schedule TF, General Instruction 2(b) and (c).

The Commission staff responds that any numerical items submitted within a text field are not subject to the restrictions of a numeric field.

D. Certificate Applications

Northwest claims that Order No. 493 dictates that the various certificate reports called for by 18 CFR 157.20, 157.21 and 157.207 must be provided on an electronic medium. However, the regulation section code, required by the record formats for Schedule CA (certificate filings), has not been provided in these reports. Northwest recommends that the section code requirement be dropped completely. Often submissions are made pursuant to a number of different sections, and Northwest questions whether inclusion of all these codes would be feasible. Conversely, sometimes the text is explanatory and not submitted pursuant to any particular code section. Moreover, the text itself will contain section code references, and Northwest believes that the repetition would be unnecessary as well as costly.

The Commission staff agrees that codes for the reports cited by Northwest were omitted from Exhibit C. The format for these reports may be discussed at the implementation conference. The section codes enable quick access to specific parts of a certificate application. Where records pertain to more than one section, respondents can indicate this fact in a footnote.

ANR & CIG argue that the Commission has not provided a method by which docket numbers can be electronically incorporated on a filing.

The Commission staff will revise the general information record to include a docket number field. For initial filings, this field will be completed by the Commission staff. Applicants will then enter the assigned docket number on subsequent filings in that docket.

ANR & CIG point out that on Schedule CA, Record 02, "Text" data type should be "character," and not "numeric" as indicated.

The Commission staff will revise Record 02 so that "Text" data is "character" data.

ANR & CIG ask that the Commission clarify whether signatures are still required within the body of the application text. If signatures are still required, ANR & CIG point out that the signature sheet will have to be submitted separately from the electronic copy.

The Commission staff agrees that signatures should be submitted on a separate transmittal letter.

ANR & CIG note that no code has been provided for exhibits which are not required to be filed electronically (e.g., Exhibit F). ANR & CIG ask that the Commission clarify how these exhibits will be referenced in the text of the application without a specific code number to identify that they are submitted on paper only. ANR & CIG suggest that the Commission consider code number 160, "Additional Information," to describe exhibits submitted on paper only.

The Commission staff agrees that Code 160 may be used to indicate those exhibits submitted only on paper.

United notes that no mention is made regarding Subpart B of Part 284. According to United, this part of the regulations requires that Initial Full Reports and Subsequent Reports be filed for Section 311 transports.

The Commission staff responds that Subpart B was not included in the electronic filing requirements of Order No. 493. Therefore, the initial and subsequent reports required under that section will continue to be filed on paper.

United indiates that the Initial Full Reports and Subsequent Reports relating to Subpart G of Part 284 are not addressed.

The Commission staff notes that it did not include Form 549–ST in the electronic filing requirements of Order No. 493. Form 549–ST must still be filed on paper.

United notes that it is required to file with Subpart G Prior Notice copies of executed agreements. United asks how it can do this. United also indicates that these prior notices must refer to the ST docket number in which it reported the initialization of the agreement. United asks whether it will be violating the cross reference rules because the Initial Full Reports filed to establish the ST docket are not reported electronically.

The Commission staff reponds that executed agreements were excluded from the electronic filing requirement. These agreements must still be filed on paper.

United asks whether it needs to refile the Blanket Certificate which authorized United to use Subpart G (open-access), and whether it needs to refile its § 157.204 Blanket certificate application. For section 7c applications previously filed, United also asks whether it will need to refile the entire application since it will be filing supplemental information and answers to data requests subsequent to September 30, 1988.

The Commission staff clarifies that the electronic filing requirement of Order No. 493 will not only apply to any type of certificate application initiated prior to the March 31, 1989 implementation date specified in Order No. 493–A.

Finally, United indicates that the monthly transportation rate discount report was not addressed (§ 284.7).

The Commission staff notes that these reports were not included in the electronic filing requirements of Order No. 493.

[FR Doc. 88–19560 Filed 8–26–88; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[LR-119-86]

Section 1060; Allocation Rules for Certain Asset Acquisitions

AGENCY: Internal Revenue Service, Treasury.

ACTION: Extension of time for comments and requests for a public hearing.

SUMMARY: This document provides notice of an extension of time for submitting comments and requests for a public hearing concerning the notice of proposed rulemaking relating to the allocation rules for certain asset acquisitions. The extended deadline for submission of comments and requests for a public hearing is November 15, 1988.

DATES: Written comments and requests for a public hearing must be delivered or mailed by November 15, 1988.

ADDRESS: Send comments and requests for a public hearing to Commissioner of Internal Revenue, Attn: CC:LR:T (LR-119-86), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Judith C. Winkler of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC (Attention: CC:LR:T) or telephone 202-566-3458 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On July 18, 1988 (53 FR 27035), the **Federal Register** published temporary regulations (T.D. 8215) with a notice of cross-reference (LR-119-86) relating to the application of the allocation rules for certain asset acquisitions under section 1060 to taxpayers generally and to partnerships. A number of members of the public have requested additional time in order to prepare their comments. This document extends the period for the submission of comments and requests for a public hearing to November 15, 1988.

This document does not meet the criteria for significant regulations set forth in paragraph 8 of the Treasury Directive on improving government regulations appearing in the **Federal Register** for Wednesday, November 8, 1978.

By direction of the Commissioner of Internal Revenue.

Dale D. Goode,

Chief, Technical Section, Legislation and Regulations Division.

[FR Doc. 88-19564 Filed 8-26-88; 8:45 am]

BILLING CODE 4830-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL-3436-3]

North Carolina; Order To Commence Proceedings To Determine Whether To Withdraw Hazardous Waste Program Approval; Correction

AGENCY: Environmental Protection Agency.

ACTION: Notice of postponement of hearing date until further notice.

SUMMARY: This notice postpones the date previously published in the **Federal Register** on June 7, 1988 (53 FR 20845), which established dates and locations for the North Carolina withdrawal proceedings hearing. The hearing scheduled to be held on September 19-21, 1988 at the Jane S. McKimmon Center in Raleigh, North Carolina is hereby postponed until further notice. EPA is suspending the proceeding pending a national policy review of consisting and capacity issues under the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act. The review of these issues is complex and a final decision will take longer than originally anticipated.

FOR FURTHER INFORMATION CONTACT: Otis Johnson, Jr., Chief, WPS, RCRA Branch, Region IV, 345 Courtland Street, Atlanta, Georgia 30365, Telephone: (404) 347-3016.

Date: August 19, 1988.

Greer C. Tidwell,

Regional Administrator.

[FR Doc. 88-19531 Filed 8-26-88; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 86-406; FCC 88-235]

Broadcast Services; Reconsideration/Clarification of the Report and Order Concerning the Main Studio and Program Origination Rules for Radio and Television Stations

AGENCY: Federal Communications Commission.

ACTION: Final rule; petitions for reconsideration and clarification.

SUMMARY: This decision responds to several Petitions for Reconsideration and/or Clarification of the *Report and Order* (52 FR 21684, June 9, 1987) in the above-cited proceeding, which modified the main studio rule and several related requirements for broadcasters. Although this action denies the petitions for reconsideration, it clarifies several aspects of the earlier decision, including the function of the main studio. The item also removes a limited stay of the revised public inspection file rules, and amends these rules to grandfather the location of public files that were authorized to be maintained outside a station's community of license prior to the effective date of the *Report and Order (R&O).*

EFFECTIVE DATE: August 29, 1988.

FOR FURTHER INFORMATION CONTACT: Marilyn Mohrman-Gillis or Michele Farquhar, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order* in MM Docket 86-406, adopted July 11, 1988, and released August 17, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Summary of Memorandum Opinion and Order (MO&O)

1. This decision reponds to seven petitions requesting reconsideration and/or clarification of the *R&O* in this proceeding. The *R&O* amended the Commission's Rules to permit broadcast stations to locate their main studios outside their communities of license at any point within their principal community contours, and eliminated the program origination requirement. The program origination provision required that every broadcast station originate more than 50 percent of its non-network programs from its main studio or from other points within its community of license. The *R&O* also revised the local public inspection file rules to provide that the public file must be maintained within the station's community of license, and adopted a requirement that each broadcast station maintain a local or toll-free telephone number if community residents would incur toll charges in telephoning a station.

2. The petitions in this proceeding generally raise five issues: (1) Whether the Commission should modify its

requirement that every station locate its public inspection file in the community of license and maintain a local or toll-free number; (2) whether the main studio has a function in light of the Commission's elimination of the program origination rule and, if so, what is the function and how is the term "main studio" defined; (3) whether the Commission should apply the main studio location rule to noncommercial educational FM stations; (4) whether the Commission should modify the main studio location standard; and (5) whether clarification of the principal community contour standard in the main studio location rule is necessary.

3. The *MO&O* reaffirms the actions adopted in the *R&O* and clarifies several aspects of the *R&O*, including the function of the main studio, the definition of the community contour standard, and the applicability of the *R&O* to noncommercial educational FM stations. First, in clarifying the function of the main studio, the *MO&O* states that a station must maintain a main studio which has the capability adequately to meet its function of serving the needs and interests of the residents of the station's community of license. To fulfill this function, a station must equip the main studio with production and transmission facilities that meet applicable standards, maintain continuous program transmission capability, and maintain a meaningful management and staff presence. Maintenance of production and transmission facilities and program transmission capability will allow broadcasters to continue, at their option, and as the marketplace demands, to produce local programs at the studio. A meaningful management and staff presence will help expose stations to community activities, help them identify community needs and interests and thereby meet their community service requirements. The term "main studio" continues to designate a broadcast station's only studio when no auxiliary studio is maintained. If a licensee has two or more studios that meet the applicable criteria, it may select one (within its community contour) to designate as its main studio.

4. Second, several petitioners questioned the Commission's decision to apply the amended main studio location rule to public broadcasters. In response, the Commission reaffirmed in the *MO&O* that the main studio requirement imposed in the *R&O*, just as previous main studio requirements, would apply to all noncommercial educational stations.

5. Finally, the *MO&O* clarified that the main studio must be located within a station's actual or its predicted principal community contour. The Commission's rules provide that the principal community contour is the contour that encompasses the minimum field strength a station is required to place over its community of license. *See* 47 CFR 73.24(j), 73.315(a), and 73.685(a) (1987). Since a principal community contour for AM stations can be defined by actual or predicted field strength, a licensee of an AM station may locate its main studio within a contour established by either actual or predicted measurements. If an AM licensee used a predicted contour in its initial construction permit application, but wishes to rely on actual measurements in relocating a main studio under the amended rule, the licensee must comply with § 73.186 of our rules. Since there is no method for locating a principal community contour based on actual measurements for FM (commercial and noncommercial educational) and television stations, the applicable contour for locating a main studio of an FM or television station under the amended rule is the predicted contour in all cases.

6. This *MO&O* also permits a station which is currently allowed to locate its public files outside its community of license at either (1) the AM transmitter main studio site pursuant to 47 CFR 73.1125(a), or (2) a main studio location authorized pursuant to the waiver provisions of 47 CFR 73.1125(a), to continue such practice. Without this grandfather provision, such stations would have been required under the *R&O* to move their public files from their main studio, where the public had been accustomed to finding them, to a location within their community of license. To provide temporary relief for those stations, the Commission, on July 16, 1987, had issued a limited stay of the *R&O*, permitting them to retain the public files at the former location pending Commission action on the petitions for reconsideration. The *MO&O* removes that stay, because it is now unnecessary given the adoption of the grandfather provision.

Final Regulatory Flexibility Act Statement

7. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, it is certified that the adopted rule will reduce the administrative burden on certain stations by grandfathering the location of public files that were authorized to be maintained outside the community of license prior to the effective date of the *R&O*.

8. The Secretary shall send a copy of this *Memorandum Opinion and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1982)).

Paperwork Reduction Act Statement

9. The requirements contained in this *Memorandum Opinion and Order* have been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirement; and will not increase or decrease burden hours imposed on the public.

Ordering Clauses

10. Accordingly, *it is ordered, that* Part 73 of the Commission's Rules and Regulations is amended as set forth below.

11. *It is further ordered,* that pursuant to the Administrative Procedure Act, 5 U.S.C. 553(d)(1), the amendments to the Commission's Rules and Regulations shall become immediately effective upon publication in the **Federal Register**.

12. *It is further ordered,* that the limited stay of the revised public inspection rules *is rescinded.*

13. *It is further ordered,* that the petitions for reconsideration and/or clarification *are granted* to the extent indicated herein, and in all other respects, *are denied.*

14. *It is further ordered,* that this proceeding *is terminated.*

15. Authority for the action taken herein is contained in sections 4(i) and 303 of the Communications Act of 1934, as amended, and § 1.429 of the Commission's rules.

List of Subjects in 47 CFR Part 73

Radio broadcasting, Television broadcasting.

Rule Amendments

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. secs. 154 and 303.

2. Section 73.3526 is amended by revising paragraph (d) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

* * * * *

(d) *Location of records.* The file shall be maintained at the main studio of the station, where such studio is located in the community to which the station is licensed or where such studio is located outside of the community of license pursuant to authorization granted under § 73.1125(a) of the rules prior to July 16, 1987, or at any accessible place (such as a public registry for documents or an attorney's office) in the community to which the station is or is proposed to be licensed. The file shall be available for public inspection at any time during regular business hours.

* * * * *

3. Section 73.3527 is amended by revising paragraph (d) to read as follows:

§ 73.3527 Local public inspection file of noncommercial educational stations.

* * * * *

(d) *Location of records.* The file shall be maintained at the main studio of the station, where such studio is located in the community to which the station is licensed or where such studio is located outside of the community of license pursuant to authorization granted under § 73.1125(a) of the rules prior to July 16, 1987, or at any accessible place (such as a public registry for documents or an attorney's office) in the community to which the station is or is proposed to be licensed. The file shall be available for public inspection at any time during regular business hours.

* * * * *

Federal Communications Commission.

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-19512 Filed 8-26-88; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 94

[PR Docket No. 87-5; FCC No. 88-255]

Amendment Regarding Multiple Address Frequencies et al.

AGENCY: Federal Communications Commission.

ACTION: Partial stay of final rule.

SUMMARY: The Commission has adopted an Order granting a partial stay of the Report and Order in PR Docket No. 87-5, 3 FCC Rcd 1564 (1988), regarding amended rules for Multiple Address System operations. Specifically, the Order stays the amended separation criteria in § 94.63(d) of the Commission's Rules, 47 CFR 94.63(d)(4)(i), pending reconsideration. Therefore, the Order reinstates the former separation citerion and provides a procedure by which the Commission will process applications for MAS operations during the interim. Those aspects of the Report and Order in PR Docket No. 87-5 not specifically stayed by the Order will remain in effect.

EFFECTIVE DATE: August 29, 1988.

FOR FURTHER INFORMATION CONTACT: Rudolfo Baca, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2444.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in PR Docket No. 87-5, adopted July 22, 1988, and released August 4, 1988.

The full text of this Commission decision is available for inspection and copying during the normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Summary of Order

1. The Commission has before it a Request for Stay (Request) filed by Digital Radio Networks, Inc. (Digital), a Motion for Stay Pending Reconsideration (Motion) filed by Radscan, Inc. (Radscan),[1] a Partial Opposition to Motion to Stay filed by EnScan, Inc. (EnScan), and an Opposition to Requests for Stay filed by NITECH, Inc. (NITECH). Digital and Radscan seek to stay the effective date of the co-channel mileage separation standard set forth in § 94.63(d)(4)(i) of the Rules, 47 CFR 94.63(d)(4)(i), as amended by the Report and Order in PR Docket No. 87-5, 3 FCC Rcd 1564 (53 FR 11855, April 11, 1988). EnScan, a manufacturer of mobile meter reading equipment, and NITECH, an equipment marketer, argue that the stay, if granted, should be limited to the separation standard between fixed master stations and that it should not suspend the implementation of those rules governing mobile-to-fixed or mobile-to-mobile separation standards.[2]

2. Upon review of the pleadings, we find that the contention that implementation of the new standard would result in harmful interference to existing licensees warrants further study. Accordingly, we conclude that the public interest will be served by staying the effective date of the co-channel separation criteria stated in § 94.63(d)(4)(i) of the revised Rules pending final decision on the petitions for reconsideration. Furthermore, we are also staying the effective date of the co-channel separation standards for fixed-to-mobile and mobile-to-mobile because these standards are the product of the technical assumptions supporting the fixed master-to-master standard.[3]

3. Our action here reinstates former § 94.63(d)(4)(i) of our Rules, 47 CFR 94.63(d)(4)(i), which provides that an applicant must state that the border area of the applicant's service area is not closer than 70 miles from the service area of existing licensees or pending applications that could be affected by the applicant. To this end, all applicants for multiple address station licenses filed on or after May 12, 1988,[4] will have three options: They may (1) certify that their applications comply with former § 94.63(d)(4)(i) of our Rules and, thus, can be processed according to the agency's established procedures; (2) amend their applications to comply with former § 94.63(d)(4)(i) so that they can be processed; [5] or (3) apply for a refund of the application fee if their applications fail to comply with former § 94.63(d)(4)(i) and cannot be amended to be brought into compliance. Petitions for refund of the application fee should be directed to the Managing Director and filed with the Secretary at 1919 M Street NW., Room 222, Washington, DC 20054.

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[1] Both Digital's Request and Radscan's Motion incorporate, either directly or by reference, a Petition for Reconsideration of the Report and Order in PR Docket No. 87-5. Additionally, the American Petroleum Institute (API) filed a Statement in Support of Digital's Request on May 12, 1988. This Order is not responsive to the merits of either Petition for Reconsideration. All petitions for reconsideration of the Report and Order in PR Docket No. 87-5 will be addressed in a subsequent order.

[2] The Commission also modified § 94.63(d)(4)(i) by adopting a mobile-to-fixed separation standard of 65 miles and a mobile-to-mobile separation standard of 50 miles. Report and Order, PR Docket number 87-5, 3 FCC Rcd at 1569.

[3] The dispute regarding the applicability to mobile systems of the technical assumptions upon which the separation criteria are based convinces us that the public interest would be furthered by staying the revised separation criteria for all MAS systems pending reconsideration. *See* NITECH's Opposition at 4-6.

[4] Applications received before May 11, 1988, have been processed under the former criteria . *See infra* at n. 13 (effective date).

[5] Applications must comply with the service radius guidelines provided in the Public Notice issued December 6, 1985, but need not comply with the power reduction table provided in § 94.65(a)(1)(iv) of the revised Rules because the reinstatement of the former criteria ordered herein obviates the need for such table pending reconsideration. A change in the applicant's service area will be considered a "substantial amendment" pursuant to §§ 1.918 and 1.962 of our Rules, 47 CFR 1.198 and 1.962, and processed accordingly.

Ordering Clauses

4. Pursuant to §§ 1.43, 1.44 and 1.429 of the Commission's Rules, and in view of the discussion above, *it is ordered* that revised § 94.63(d)(4)(i) of our Rules, 47 CFR 94.63(d)(4)(i), adopting co-channel mileage separation criteria for multiple address stations is *Stayed nunc pro tunc* pending reconsideration; therefore, the separation criteria stated in former § 94.63(d)(4)(i) will be reinstated during the interim.

5. *It is further ordered* that those portions of the Rules modified by the Report and Order in this docket [6] and not specifically stayed by this Order will remain in effect.[7]

Federal Communications Commission.

H. Walker Feaster III,

Acting Secretary

[FR Doc. 88-19098 Filed 8-26-88; 8:45 am]

BILLING CODE 6712-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1815, 1817, 1835, and 1870

Changes to NASA FAR Supplement Concerning "NASA Research Announcement"

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This amendment to the NASA FAR Supplement (NSF) constitutes NASA's implementation of the Broad Agency Announcement, as authorized by the Federal Acquisition Regulation (FAR).

EFFECTIVE DATE: September 6, 1988.

FOR FURTHER INFORMATION CONTACT: W. A. Greene, Chief, Regulations Development Branch, Procurement Policy Division (Code HP), Office of Procurement, NASA Headquarters, Washington, DC 20546, Telephone: (202) 453-8923.

SUPPLEMENTARY INFORMATION:

Background

FAR 6.102 (48 CFR 6.102) and 35.016 (48 CFR 35.016) authorize and provide procedures for the use of a "Broad Agency Announcement" for obtaining research proposals. This rule establishes the NASA Research Announcement (NRA) as one mechanism for exercising the FAR authority. The rule covers policies and procedures for preparing and issuing NRAs, proposal preparation instructions, solicitation provisions, late proposals, evaluation and selection procedures, relationship to unsolicited proposals and related NASA administration procedures. The NRA was previously published for public comment in a **Federal Register** (52 FR 26705, July 16, 1987) notice of proposed rule making. The single public comment received was considered in writing the final rule. However, a number of improvements relating primarily to NASA's internal operations have been made based on comments from various NASA installations.

Impact

The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. These regulations fall in this category. NASA certifies that these regulations will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Information collection approval number 2700-0042, assigned by OMB to the NASA solicitation process, applies to individual NRAs issued pursuant to this rule.

List of Subjects in 48 CFR Parts 1815, 1817, 1835, and 1870

Government procurement.

S. J. Evans,

Assistant Administrator for Procurement.

PARTS 1815, 1817, 1835 AND 1870—[AMENDED]

1. The authority citation for 48 CFR 1815, 1817, 1835, and 1870 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1815—[AMENDED]

2. Subpart 1815.4 is amended as set forth below:

1815.407 [Amended]

a. In 1815.407, paragraph (a), the words "for Announcements of Opportunity or" are removed, and the phrase "or for broad agency announcements listed in 1835.016." is added after the word "program".

1815.412 [Amended]

b. In the introductory material of 1815.412, the phrase "Announcement of Opportunity (see 1870.1)" is removed, and the phrase "broad agency announcements listed in 1835.016" is added in its place.

1815.413-2 [Amended]

c. In 1815.413-2, subparagraph (c)(2), the words "and proposals in response to a NASA Research Announcement" are added after the phrase "unsolicited proposals."

3. Subpart 1815.5 is amended as set forth below:

1815.505-70 [Amended]

a. In 1815.505-70, the following sentence is added at the end of the section:

"* * * Unsolicited renewal proposals within the scope of an open NASA Research Announcement (NRA) shall be evaluated in the same manner as unsolicited proposals described in 1815.506(b)."

1815.506 [Amended]

b. In 1815.506, paragraph (b), the word "Reserved." is removed, and the following material is added to read as follows:

(b) *Relationship to open NRAs.* An unsolicited proposal for a new effort, identified by an evaluating office as being within the scope of an open NRA, shall be evaluated as a response to that NRA under 1835.016-70(e), provided that the evaluating office can either (i) state that the proposal is not at a competitive disadvantage or (ii) give the offeror an opportunity to amend the unsolicited proposal to ensure compliance with the applicable NRA proposal preparation instructions. If these conditions cannot be met, the proposal must be evaluated separately.

4. Subpart 1815.6 is amended as set forth below:

1815.613-70 [Amended]

In 1815.613-70, the following material is added between the reference "1870.103, App. I." and the next sentence:

"Proposals received in response to an open NASA Research Announcement will be evaluated in accordance with 1835.016-70(e). Unsolicited proposals identified by an evaluating office as being within the scope of an open NASA Research Announcement shall be evaluated under 1835.016-70(d). Small Business Innovation Research (SBIR) proposals will be evaluated in accordance with the SBIR program solicitations issued under the authority of section 9 of the Small Business Act (15 U.S.C. 638)."

PART 1817—[AMENDED]

5. Subpart 1817.5 is amended as set forth below:

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[6] Report and Order, PR Docket No. 87-5, 3 FCC Rcd at 1572

[7] Erratum, PR Docket No. 87-5, 3 FCC Rcd 2467 (1988) (amended rules effective May 11, 1988).

1817.504 [Amended]

In 1817.504, paragraph (a), the word "Solicitations" is removed, and the phrase "Invitations for bids and requests for proposals" is added in its place.

PART 1835—[AMENDED]

6. Part 1835 is amended by adding 1835.016 and 1835.016–70 to read as follows:

1835.016 Broad Agency Announcements.

(a) The following forms of broad agency announcements are authorized for use:

(1) Announcements of Opportunity, described in Subpart 1870.1, NASA Acquisition of Investigations System.

(2) NASA Research Announcements, described in 1835.016–70.

(3) Other forms of announcements approved by the Assistant Administrator for Procurement.

(b) Broad agency announcements may not preclude the participation of any offeror capable of satisfying the Government's needs unless a justification for other than full and open competition is approved under FAR 6.304 (see FAR 6.102(d)(2) and 35.001).

(c) Other program announcements, notices, and letters not authorized by this section shall not be used to solicit proposals which may result in contracts.

1835.016–70 NASA Research Announcements.

(a) *Scope.* This subsection prescribes regulations and procedures for the use of a NASA Research Announcement (NRA), a form of broad agency announcement (see FAR 6.102(d)(2)). An NRA is used to announce NASA's research interests and, after peer or scientific review using factors in the NRA, select proposals for funding. Unlike an RFP containing a statement of work or specification to which offerors are to respond, an NRA provides for the submission of competitive project ideas, conceived by the offerors, in one or more program areas of interest to NASA. The NRA is intended to be used for those research procurements for which it would be impossible to draft an adequate request for proposals in sufficient detail without restraining the technical response, and thus hindering the competition of ideas rather than expanding competition. Consequently, an NRA shall not be used in place of an RFP when the procurement requirement is narrowly defined and it is necessary to use a detailed description or specification.

(b) *Issuance.* (1) Each NRA shall be assigned a unique number in accordance with 1804.7102–1.

(2) NRAs may remain open for proposal submission for a maximum of one year. They may not be amended or modified once issued, but may be reissued by assigning a new number and resynopsizing. (See also 1835.016–70(g).) NRAs should remain open for at least 90 days.

(3) Before issuance, each field-generated NRA shall be concurred in by the Procurement Officer and approved by the Field Installation Director or designee, who shall serve as or designate a selecting official. Before issuance, each Headquarters-generated NRA shall be concurred in by General Counsel (Code GK) and the Director, Headquarters Grants and Contracts Division (Code HW) and approved by the cognizant Program Associate Administrator or designee, who shall serve as or designate a selecting official. If a Headquarters-generated NRA may result in awards by a NASA field installation, the concurrence of that installation's Procurement Officer may be sought in place of or in addition to Code HW's concurrence.

(4) The contracting officer shall assure that the NRA is synopsized in the Commerce Business Daily (CBD). The CBD synopsis required by FAR 35.016(c) satisfies the synopsis requirement at FAR 5.201 and the synopsis contemplated by FAR 5.205 is not required. The synopsis shall be brief and provide the address for obtaining a copy of the detailed NRA. The technical part of the synopsis is intended to describe an identifiable area of interest and should not exceed 50 words.

(5) The NRA shall be prepared, printed, and distributed by or under the direction of the selecting official. Distribution shall not begin until the concurrence of the Procurement Officer has been obtained and the contracting officer has confirmed that the synopsis requirements have been met. The NRA shall be distributed to each coordinating office responsible for receipt of unsolicited proposals and to the Office of Procurement (Code HS).

(6) In addition to the approvals in paragraph (b)(3) above, each Installation shall submit its first two NRAs to the Assistant Administrator for Procurement (Code HS) for concurrence before issuance.

(c) *Content.* The NRA shall consist of the following items in the order shown. This entire package shall be provided in response to requests.

(1) *Cover.* The cover shall display:

(i) "OMB Approval Number 2700–0042" in the upper right corner.

(ii) Title (centered, in uppercase).

(iii) "NASA Research Announcement Soliciting Research Proposals for the Period Ending ________" (centered, on three lines, two inches below the title, insert closing date).

(iv) NRA number (centered, two inches below closing date).

(v) Official address for office issuing NRA (centered, at bottom of cover).

(2) *Summary and Supplemental Information.*

(i) The Summary and Supplemental Information shall not exceed two pages and shall include:

(A) Title (centered, in uppercase).

(B) Introductory paragraphs describing the purpose of the NRA and the period for receipt of proposals. When proposals received during this period may be grouped for evaluation at separate times, the introductory paragraphs shall indicate when evaluations are planned and shall include the following remark:

> A proposal that is scientifically and programmatically meritorious, but that cannot be accepted during its initial review under an NRA due to funding uncertainties may be included in subsequent reviews unless the offeror requests otherwise.

(C) NRA number.

(D) Address for submitting proposals, including "ATTN: NRA ________."

(E) Copies required.

(F) Selecting official's title.

(G) Name, address, and telephone number for additional technical information.

(H) Name and telephone number of Procurement Office point of contact for administrative and contractual information.

(I) Additional instructions which supplement the Instructions for Responding to NASA Research Announcements for Solicited Research Proposals (see 1870.2). Such information shall be kept to the minimum necessary for a particular NRA and shall cite specific "Instructions" paragraphs supplemented.

(J) When awards will be chargeable to funds of the new fiscal year and the NRA is to be issued before funds are available, the NRA shall contain a statement as follows:

> Funds are not presently available for awards under this NRA. The Government's obligation to make awards is contingent upon the availability of appropriated funds from which payment for award purposes can be made and the receipt of proposals which the Government determines are acceptable for award under this NRA.

(ii) The Summary and Supplemental Information may include estimates of the amount of funds that will be available and the number of anticipated awards. A breakdown of the estimates by research area may also be shown.

(iii) The Summary and Supplemental Information may indicate that proposals submitted under an earlier NRA and held for subsequent reviews will be considered and need not be resubmitted. To so indicate, the earlier NRA shall be identified by number in the following statement:

> Proposals for which no selection decision was made under NRA ________ and held for subsequent reviews will be considered under this NRA and need not be resubmitted.

(3) Technical Description. The first page shall contain the NRA number and title at the top. A brief description not exceeding two pages is preferable, but it should be detailed enough to enable ready comprehension of the research areas of interest to NASA. Specifications containing detailed statements of work more suited to RFPs should be avoided. Any program management information included must be limited to matters that are essential for proposal preparation.

(4) Instructions for Responding to NASA Research Announcements for Solicited Research Proposals. The NRA shall contain instructions in accordance with 1870.203.

(d) *Unsolicited proposals.* (1) Unsolicited proposals for new efforts that are within the scope of an open NRA shall be evaluated in accordance with 1815.506(b).

(2) Unsolicited proposals for renewal of ongoing efforts that are within the scope of an open NRA shall be evaluated in accordance with 1815.505-70.

(3) A broad agency announcement shall not be considered to be an "acquisition requirement" as the term is used in FAR 15.507(a)(2).

(e) *Receipt of proposals, evaluation, and selection.* (1) Proposals shall be protected as provided in 1815.508-70 and 1815.509-70.

(2) Evaluation, selection, and award may occur during or after the period established for receipt of proposals. Late proposals and modifications shall be treated in accordance with 1815.412 (a) and (b).

(3) When more than one time is established in the NRA for evaluating proposals, proposals received prior to the time established will be considered as part of the initial group to be evaluated. Subsequent groups of proposals to be evaluated shall be formed from those proposals received after the time established for the earlier evaluation groups and prior to the time established for a subsequent group, along with those proposals, if any, held over under paragraph (e)(8) below.

(4) The selection decision shall be made following peer or scientific review of a proposal. Peer or scientific review shall involve evaluation, outside NASA, by a discipline specialist in the area of the proposal or evaluation by an in-house specialist or both. Evaluation by specialists outside NASA shall be conducted subject to the conditions in FAR 15.413-2(f) and 1815.413 and 1815.413-2. In particular, the selecting official shall ensure compliance with FAR 15.413-2(f)(5) regarding the designation of outside evaluators and avoidance of conflicts of interest. After receipt of a proposal and prior to selection, scientific or engineering personnel shall communicate with an offeror, regarding the proposal, only for the purpose of clarification, as defined in FAR 15.601, or in order to understand the meaning of some aspect of the proposal which is not clear or obtain confirmation or substantiation of a proposed approach, solution, or cost estimate.

(5) Competitive range determinations shall not be made, and best and final offers shall not be requested.

(6) All or part of a proposal may be selected unless the offeror requests otherwise. In addition, changes to a selected proposal may be sought as long as (i) the ideas or other aspects of the proposal on which selection is based are contained in the proposal as originally submitted, and are not introduced by the changes; and (ii) the changes sought would not involve a material alteration to the requirements stated in the NRA. Changes that would affect a proposal's selection shall not be sought. When changes are desired, they may be described to the contracting officer under paragraph (e)(10)(ii) below, or the selecting official may request revisions from the offeror. The changes shall not transfer information from one offeror's proposal to another offeror (see FAR 15.610(d)(2)). When collaboration between offerors would improve proposed research programs, collaboration may be suggested to the offerors.

(7) The basis for selection of a proposal shall be documented in a selection statement applying the evaluation factors in the NRA. The selection statement represents the conclusions of the selecting official and must be self-contained. It shall not incorporate by reference the evaluations of the reviewers.

(8) A proposal that is scientifically and programmatically meritorious, but that is not selected during its initial review under an NRA may be included in subsequent reviews unless the offeror requests otherwise. If the proposal is not to be held over for subsquent reviews, the offeror shall be notified that the proposal was not selected for award.

(9) The selecting official shall notify each offeror whose proposal was not selected for award and explain generally why the proposal was not selected. It requested, the selecting official shall arrange a debriefing under 1815.1003, with the participation of a contracting officer.

(10) The selecting official shall forward to the contracting officer—

(i) The results of the technical evaluation, including the total number of proposals received under the NRA by the time of selection, the selection statement, and the proposal(s) selected for funding;

(ii) A description of any changes desired in any offeror's statement of work, including the reasons for the changes and any effect on level of funding;

(iii) If a contract will be used to fund the proposal, a description of deliverables, including technical reports, and delivery dates, consistent with the requirements of the NRA;

(iv) A procurement request;

(v) Comments on the offeror's cost proposal: either the selecting official's comments, which may be based on the reviewers' comments, or copies of the reviewers' comments with any different conclusions of the selecting official. The comments shall address the need for and reasonableness of travel, computer time, materials, equipment, subcontracted items, publication costs, labor hours, labor mix, and other costs; and

(vi) A copy of the selected proposal as originally submitted, any revisions, and any related correspondence from the successful offeror.

(11) The selecting official may provide to the contracting officer copies of the reviewers' evaluations. Reviewers' names and institutions may be omitted in order to protect their identity.

(12) The selecting official may notify each offeror whose proposal was selected for negotiation leading to award.

(i) The notification shall state that—

(A) The proposal has been selected for negotiation leading to award;

(B) The offeror's business office will be contacted by a contracting officer, who is the only official authorized to obligate the Government; and

(C) Any expenses incurred by the offeror in anticipation of receiving an award will be at the risk of the offeror.

(ii) The notification may identify which award instrument (contract, grant, cooperative agreement, or other agreement) has been recommended.

(f) *Award.* If a contract is selected as the award instrument (see FAR 35.003(a) and 1835.003(a)), the contracting officer shall—

(1) Advise the offeror that the Government contemplates entering into negotiations; the type of contract contemplated to be awarded; and the estimated award date, level-of-effort, and delivery schedule;

(2) Send the offeror a model contract, it necessary, including modifications contemplated in the offeror's statement of work, and request agreement or identification of any exceptions; the contract statement of work may summarize the proposed research, state that the research shall be conducted in accordance with certain technical sections of the proposai, which shall be identified by incorporating them into the contract by reference, and identify any changes to the proposed research;

(3) Request the offeror to complete and return certifications and representations and Standard Form 33, "Solicitation, Offer, and Award," or other appropriate forms;

(4) Conduct negotiations in accordance with FAR Subparts 15.8 and 15.9, as applicable;

(5) Award a contract with reasonable promptness to the successful offeror by transmitting written notice of the award to that offeror; and

(6) Comply with FAR Subparts 4.6 and 5.3 on contract reporting and synopses on contract awards, to the extent required by these subparts.

(g) *Cancellation of an NRA.* When program changes, the absence of program funding, or any other reason requires cancellation of an NRA, the contracting officer shall publish a notice in the Commerce Business Daily. The office issuing the NRA may provide additional notification by using the mailing list for the NRA.

PART 1870—[AMENDED]

7. Part 1870 is amended by adding Subpart 1870.2 consisting of sections 1870.201 through 1870.203 and Appendix I to read as follows:

Subpart 1870.2—NASA Research Announcement System

1870.201 Purpose.

It is NASA policy to encourage submission of research proposals relevant to agency requirements. The NASA Research Announcement (NRA) System is one means of implementing the policy by permitting the solicitation and competitive selection of research projects in accordance with statute while at the same time preserving the traditional concepts and understandings associated with NASA sponsorship of research.

1870.202 System content.

(a) The regulations governing the NRA System (see 1835.016–70) set forth the requirements for preparing, issuing, and processing NRAs.

(b) The system contains specific instructions for proposers. These instructions shall be included in the NRA, a form of broad agency announcement authorized at 1835.016.

1870.203 Instructions for responding to NRAs.

(a) The "Instructions for Responding to NASA Research Announcements for Solicited Research Proposals" document (prescribed in 1835.016–70(c)(4)) is set forth as Appendix I to this section 1870.203.

(b) This Appendix may be reproduced locally as part of the NRA provided the following conditions are met:

(1) For each NRA the issuing office shall verify that the most recent version of Appendix I, as contained in the NFS, is used.

(2) The current text shall be reproduced verbatim; however, the issuing office may remove the NFS page headers and add the NRA number in order to identify the NRA to which the Appendix is attached. Any other change shall be treated as a deviation in accordance with 18–1.400.

Appendix I To 1870.203—Instructions for Responding to NASA Research Announcements for Solicited Research Proposals

Instructions for Responding to NASA Research Announcements for Solicited Research Proposals (August 1988)

1. Foreword

a. NASA depends upon industry, educational institutions and other nonprofit organizations for most of its research efforts. While a number of mechanisms have been developed over the years to inform the research community of those areas in which NASA has special research interests, these instructions apply only to "NASA Research Announcements," a form of "broad agency announcement" described in 6.102(d)(2) and 35.016 of the Federal Acquisition Regulation (FAR). The "NASA Research Announcement (NRA)" permits competitive selection of research projects in accordance with statute while at the same time preserving the traditional concepts and understandings associated with NASA sponsorship of research.

b. These instructions are Appendix I to 18–70.203 of the NASA Federal Acquisition Regulation Supplement.

2. Policy

a. NASA fosters and encourages the submission of research proposals relevant to agency mission requirements by solicitations, "NASA Research Announcements," which describe research areas of interest to NASA. Proposals received in response to an NRA will be used only for evaluation purposes.

b. NASA does not allow a proposal, the contents of which are not available without restriction from another source, or any unique ideas submitted in response to an NRA to be used as the basis of a solicitation or in negotiation with other organizations, nor is a pre-award synopsis published for individual proposals.

c. A solicited proposal that results in a NASA award becomes part of the record of that transaction and may be available to the public on specific request; however, information or material that NASA and the awardee mutually agree to be of a privileged nature will be held in confidence to the extent permitted by law, including the Freedom of Information Act.

3. Purpose

These instructions are intended to supplement documents identified as "NASA Research Announcements." The NRAs contain programmatic information and certain "NRA-specific" requirements which apply only to proposals prepared in response to that particular announcement. These instructions contain the general proposal preparation information which applies to responses to all NRAs.

4. Relationship To Award

a. A contract, grant, cooperative agreement, or other agreement may be used to accomplish an effort funded on the basis of a proposal submitted in response to an NRA. NASA does not have separate "grant proposal" and "contract proposal" and "contract proposal" categories, so all proposals may be prepared in a similar fashion. NASA will determine the appropriate instrument.

b. Grants are generally used to fund basic research in educational and nonprofit institutions, while research in other private sector organizations is accomplished under contract. Additional information peculiar to the contractual process (certifications, cost and pricing data, facilities information, etc.) will be requested, as necessary, as the procurement progresses. Contracts resulting from NRAs are subject to the Federal Acquisition Regulation and the NASA FAR Supplement (NHB 5100.4). Any resulting grants or cooperative agreements will be awarded and administered in accordance with the NASA Grant and Cooperative Agreement Handbook (NHB 5800.1).

5. Conformance to Guidance

a. NASA dos not have any mandatory forms or formats for preparation of responses to NRAs; however, it is requested that proposals conform to the procedural and submission guidelines covered in these instructions. In particular, NASA may accept proposals without discussion; hence, proposals should initially be as complete as possible and be submitted on the proposers' most favorable terms.

b. In order to be considered responsive to the solicitation, a submission must, at a minimum, present a specific project within the areas delineated by the NRA; contain sufficient technical and cost information to permit a meaningful evaluation; be signed by an official authorized to legally bind the submitting organization; not merely offer to perform standard services or to just provide computer facilities or services; and not significantly duplicate a more specific current or pending NASA solicitation. NASA reserves the right to reject any or all proposals received in response to an NRA when such action is considered in the best interest of the Government.

6. NRA-Specific Items

a. Several proposal submission items will appear in the NRA itself. These include: The unique NRA identifier; when to submit proposals; where to send proposals; number of copies required; and sources for more information.

b. Items included in these instructions may be supplemented by the NRA, as circumstances warrant. Examples are: Technical points for special emphasis; additional evaluation factors; and proposal length.

7. Proposal Contents

a. The following general information is needed in all proposals in order to permit consideration in an objective manner. NRAs will generally specify topics for which additional information or greater detail is desirable. Each proposal shall contain all submitted material, including a copy of the transmittal letter if it contains substantive information.

b. *Transmittal Letter or Prefatory Material—*

(1) The legal name and address of the organization and specific division or campus identification if part of a larger organization;

(2) A brief, scientifically valid project title intelligible to a scientifically literate reader and suitable for use in the public press;

(3) Type of organization: e.g., profit, nonprofit, educational, small business, minority, women-owned, etc.:

(4) Name and telephone number of the principal investigator and business personnel who may be contacted during evaluation or negotiation;

(5) Identification of any other organizations that are currently evaluating a proposal for the same efforts;

(6) Identification of the specific NRA, by number and title, to which the proposal is responding;

(7) Dollar amount requested of NASA, desired starting date, and duration of project;

(8) Date of submission; and

(9) Signature of a responsible official or authorized representative of the organization, or any other person authorized to legally bind the organization (unless the signature appears on the proposal itself).

c. Restriction on Use and Disclosure of Proposal Information

It is NASA policy to use information contained in proposals for evaluation purposes only. While this policy does not require that the proposal bear a restrictive notice, offerors or quoters should, in order to maximize protection of trade secrets or other information that is commercial or financial and confidential or privileged, place the following notice on the title page on the proposal and specify the information subject to the notice by inserting appropriate identification, such as page numbers, in the notice. In any event, information (data) contained in proposals will be protected to the extent permitted by law, but NASA assumes no liability for use and disclosure of information not made subject to the notice.

Restriction on Use and Disclosure of Proposal Information

The information (data) contained in [*insert page numbers or other identification*] of this proposal constitutes a trade secret and/or information that is commercial or financial and confidential or privileged. It is furnished to the Government in confidence with the understanding that it will not, without permission of the offeror, be used or disclosed other than for evaluation purposes: provided, however, that in the event a contract (or other agreement) is awarded on the basis of this proposal the Government shall have the right to use and disclose this information (data) to the extent provided in the contract (or other agreement). This restriction does not limit the Government's right to use or disclose this information (data) if obtained from another source without restriction.

d. Abstract

Include a concise (200–300 word if not otherwise specified in the NRA) abstract describing the objective of the proposed effort and the method of approach.

e. Project Description.

(1) The main body of the proposal shall be a detailed statement of the work to be undertaken and should include objectives and expected significance; relation to the present state of knowledge in the field; and relation to previous work done on the project and to related work in progress elsewhere. The statement should outline the general plan of work, including the broad design of experiments to be undertaken and an adequate description of experimental methods and procedures. The project description should be prepared in a manner that addresses the evaluation factors in these instructions and any additional specific factors in the NRA. Any substantial collaboration with individuals not referred to in the budget or use of consultants should be described. Note, however, that subcontracting significant portions of a research project is discouraged.

(2) When it is expected that the effort will require more than one year for completion, the proposal should cover the complete project to the extent that it can be reasonably anticipated. Principal emphasis should, of course, be on the first year of work, and the description should distinguish clearly between the first year's work and work planned for subsequent years.

f. Management Approach

For large or complex efforts involving interactions among numerous individuals or other organizations, plans for distribution of responsibilities and any necessary arrangements for ensuring a coordinated effort should be described. Aspects of any required intensive working relations with NASA field centers that are not logical inclusions elsewhere in the proposal should be described in this section.

g. Personnel

The principal investigator is responsible for direct supervision of the work and participates in the conduct of the research regardless of whether or not compensation is received under the award. A short biographical sketch of the principal investigator, a list of principal publications and any exceptional qualifications should be included. Omit social security number and other personal items which do not merit consideration in evaluation of the proposal. Give similar biographical information on other senior professional personnel who will be directly associated with the project. Give the names and titles of any other scientists and technical personnel associated substantially with the project in an advisory capacity. Universities should list the approximate number of students or other assistants, together with information as to their level of academic attainment. Any special industry-university cooperative arrangements should be described.

h. Facilities and Equipment

(1) Describe available facilities and major items of equipment especially adapted or suited to the proposed project, and any additional major equipment that will be required. Identify any Government-owned facilities, industrial plant equipment, or special tooling that are proposed for use on the project.

(2) Before requesting a major item of capital equipment, the proposer should determine if sharing or loan of equipment already within the organization is a feasible alternative to purchase. Where such arrangements cannot be made, the proposal should so state. The need for items that typically can be used for both research and non-research purposes should be explained.

i. Proposed Costs

(1) Proposals should contain cost and technical parts in one volume: do not use separate "confidential" salary pages. As applicable, include separate cost estimates for salaries and wages; fringe benefits; equipment; expendable materials and supplies; services; domestic and foreign travel; ADP expenses; publication or page charges; consultants; subcontracts; other miscellaneous identifiable direct costs; and indirect costs. List salaries and wages in appropriate organizational categories (e.g., principal investigator, other scientific and engineering professionals, graduate students, research assistants, and technicians and other non-professional personnel). Estimate all manpower data in terms of man-months or fractions of full-time.

(2) Explanatory notes should accompany the cost proposal to provide identification and estimated cost of major capital equipment items to be acquired; purpose and estimated number and lengths of trips planned; basis for indirect cost computation (including date of most recent negotiation and cognizant agency); and clarification of other items in the cost proposal that are not self-evident. List estimated expenses as yearly requirements by major work phases. (Standard Form 1411 may be used).

(3) Allowable costs are governed by FAR Part 31 and the NASA FAR Supplement Part 18-31 (and OMB Circulars A-21 for educational institutions and A-122 for nonprofit organizations).

j. Security

Proposals should not contain security classified material. However, if the proposed research requires access to or may generate security classified information, the submitter will be required to comply with applicable Government security regulations.

k. Current Support

For other current projects being conducted by the principal investigator, provide title of project, sponsoring agency, and ending date.

l. Special Matters

(1) Include any required statements of environmental impact of the research, human subject or animal care provisions, conflict of interest, or on such other topics as may be required by the nature of the effort and current statutes, executive orders, or other current Government-wide guidelines.

(2) Proposers should include a brief description of the organization, its facilities, and previous work experience in the field of the proposal. Identify the cognizant Government audit agency, inspection agency, and administrative contracting officer, when applicable.

8. Renewal Proposals

a. Renewal proposals for existing awards will be considered in the same manner as proposals for new endeavors. It is not necessary that a renewal proposal repeat all of the information that was in the original proposal upon which the current support was based. The renewal proposal should refer to its predecessor, update the parts that are no longer current, and indicate what elements of the research are expected to be covered during the period for which extended support is desired.

A description of any significant findings since the most recent progress report should be included. The renewal proposal should treat, in reasonable detail, the plans for the next period, contain a cost estimate, and otherwise adhere to these instructions.

b. NASA reserves the right to renew an effort either through amendment of an existing contract or by a new award.

9. Length

Unless otherwise specified in the NRA, every effort should be made to keep proposals as brief as possible, concentrating on substantive material essential for a complete understanding of the project. Experience shows that few proposals need exceed 15–20 pages. Any necessary detailed information, such as reprints, should be included as attachments rather than in the main body of the proposal. A complete set of attachments is necessary for each copy of the proposal. As proposals are not returned, avoid use of "one-of-a-kind" attachments: their availability may be mentioned in the proposal.

10. Joint Proposals

a. Some projects involve joint efforts among individuals in different organizations or mutual efforts of more than one organization. Where multiple organizations are involved, the proposal may be submitted by only one of them. In this event, it should clearly describe the role to be played by the other organizations and indicate the legal and managerial arrangements contemplated. In other instances, simultaneous submission of related proposals from each organization might be appropriate, in which case parallel awards would be made.

b. Where a project of a cooperative nature with NASA is contemplated, the proposal should describe the contributions expected from any participating NASA investigator and agency facilities or equipment which may be required. However, the proposal must be confined only to that which the proposing organization can commit itself. "Joint" proposals which purport to specify the internal arrangements NASA will actually make are not acceptable as a means of establishing an agency commitment.

11. Late Proposals

A proposal or modification thereto received after the date or dates specified in an NRA may still be considered if the selecting official deems it to offer NASA a significant technical advantage or cost reduction.

12. Withdrawal

Proposals may be withdrawn by the proposer at any time. Offerors are requested to notify NASA if the proposal is funded by another organization or of other changed circumstances which dictate termination of evaluation.

13. Evaluation Factors

a. Unless otherwise specified in the NRA, the principal elements (of approximately equal weight) considered in evaluating a proposal are its relevance to NASA's objectives, intrinsic merit, and cost.

b. Evaluation of a proposal's relevance to NASA's objectives includes the consideration of the potential contribution of the effort to NASA's mission.

c. Evaluation of its intrinsic merit includes the consideration of the following factors, none of which is more important than any other:

(1) Overall scientific or technical merit of the proposal or unique and innovative methods, approaches, or concepts demonstrated by the proposal.

(2) The offeror's capabilities, related experience, facilities, techniques, or unique combinations of these which are integral factors for achieving the proposal objectives.

(3) The qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are critical in achieving the proposal objectives.

(4) Overall standing among similar proposals available for evaluation and/or evaluation against the known state-of-the-art.

d. Evaluation of the cost of a proposed effort includes the consideration of the realism and reasonableness of the proposed cost and the relationship of the proposed cost to available funds.

14. Evaluation Techniques

Selection decisions will be made following peer and/or scientific review of the proposals. Several evaluation techniques are regularly used within NASA. In all cases, however, proposals are subject to scientific review by discipline specialists in the area of the proposal. Some proposals are reviewed entirely in-house where NASA has particular competence; others are evaluated by a combination of in-house people and selected external reviewers, while yet others are subject to the full external peer review technique (with due regard for conflict-of-interest and protection of proposal information), such as by mail or through assembled panels. Regardless of the technique, the final decisions are always made by a designated NASA selecting official. A proposal which is scientifically and programmatically meritorious, but which is not selected for award during its initial review under the NRA may be included in subsequent reviews unless the proposer requests otherwise.

15. Selection for Award

a. When a proposal is not selected for award, and the proposer has indicated that the proposal is not to be held over for subsequent reviews, the proposer will be notified that the proposal was not selected for award. NASA will notify the proposer and explain generally why the proposal was not selected. Proposers desiring additional information may contact the selecting official who will arrange a debriefing.

b. When a proposal is selected for award, negotiation and award will be handled by the procurement office in the funding installation. The proposal is used as the basis for negotiation with the submitter. Formal RFPs are not used to obtain additional information on a proposal selected under the NRA process.

However, the contracting officer may request certain business data and may forward a model contract and other information which will be of use during the contract negotiation.

16. Cancellation of NRA

NASA reserves the right to make no awards under this NRA and, in the absence of program funding or for any other reason, to cancel this NRA by having a notice published in the *Commerce Business Daily.* NASA assumes no liability for cancelling the NRA or for anyone's failure to receive actual notice of cancellation. Cancellation may be followed by issuance and synopsis of a revised NRA, since amendment of an NRA is normally not permitted.

[FR Doc. 88-19516 Filed 8-26-88; 8:45 am]

BILLING CODE 7510-01-M

Proposed Rules

Federal Register
Vol. 53, No. 167
Monday, August 29, 1988

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[AMS-FV-88-050PR]

Almonds Grown in California; Administrative Rules and Regulations Concerning Crediting for Marketing Promotion and Paid Advertising Expenditures

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would change administrative rules and regulations established under the Federal marketing order for California almonds to: (1) Allow handlers credit against their assessments for payments for in-store supermarket advertising using fixed position, i.e., stationary display advertisements, or video media; and (2) remove restrictions on a provision which allows handlers to receive 150 percent credit for handler payments to the Almond Board of California (Board) for the Board's use for generic promotion and paid adverstising. These changes were recommended by the Board, the agency responsible for local administration of the order, and would give handlers additional flexibility in obtaining credit against their advertisting assessments under the order.

DATE: Comments must be received by September 28, 1988.

ADDRESS: Interested persons are invited to submit written comments concerning this proproal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, Room 2085-S, P.O. Box 96456, Washington, DC 20250-6456. Comments should reference the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Jacquelyn R. Schlatter, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20250-6456; telephone: (202) 447-5120.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Order No. 981 (7 CFR Part 981), as amended, regulating the handling of almonds grown in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (REA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 115 handlers of almonds who are subject to regulation under the almond marketing order and approximately 7,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having gross annual revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of California almonds may be classified as small entities.

This proposed rule invites comments on changes to the administrative rules and regulations of the almond marketing order. These changes were recommended by the Board and would give additional opportunities to handlers to recive credit against their annual creditable assessments. It is AMS's view that the proposal would relieve restrictions on handlers and provide additional opportunities to handlers to receive credit against their advertising assessments, while not imposing any additional costs on handlers.

This proposal would revise § 981.441 of Subpart—Administrative Rules and Regulations and is based on recommendations of the Board and upon other available information.

Section 981.41(c) of the order provides that the Board, with the approval of the Secretary, may allow handlers to receive credit for their direct marketing promotion expenditures, including paid advertising, against those portions of such handlers' assessment obligations which are designated for marketing promotion, including paid advertising. That paragraph also provides that handlers shall not receive credit for allowable expenditures that would exceed the amount of such creditable assessments. Section 981.41(e) provides that before crediting is undertaken, and once a recommendation is received from the Board, the Secretary shall prescribe appropriate rules and regulations as are necessary to effectively administer provisions for creditable advertising expenditures.

Section 981.441 currently prescribes rules and regulations to regulate crediting for marketing promotion which includes paid advertising. This proposed rule would amend § 981.441(c) concerning crediting for paid advertising and § 981.441(e) which allows handlers to receive a 150 percent credit against their advertising assessments for payments to the Board for the Board's generic promotion and paid advertising program.

Section 981.441(c) prescribes requirements which specifically apply to crediting for paid advertising. This proposal would amend § 981.441(c) by adding a new provision to § 981.441(c)(3)(i) to allow handlers credit against their creditable assessments for 100 percent of such handlers' payments for in-store supermarket generic or brand advertising using fixed position or video media. Such in-store supermarket advertising would have to be conducted through an advertising firm. The advertising firm would pay the supermarket for displaying the advertisements. Therefore, the money would not come directly from the handler who owned the brand or the product. Provision for advertising directly between a handler and a supermarket would not allow the Board to separate the costs for advertising and shelf space as these are usually consolidated under the general heading "advertising." Fixed position advertisements, which are stationary display advertisements, would include at least two of the following: (1) Processed color displays enclosed in frames and mounted on supermarket shopping carts; (2) overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or (3) processed color advertisements enclosed in frames and mounted on a supermarket shelf. Two of the three methods would be required as the Board believes this to be the most effective method of utilizing fixed position advertisements. Video advertisements would be shown on video monitors running television commercials, or "infomercials" (informative commercials), for specific products on a rotating basis. Handlers would submit to the Board a copy of the agency invoice to the supermarket, a copy of the actual advertisement or video tape, a published rate card from an advertising firm, and a copy of the agency invoice to the handler. This proposal could give handlers using a brand name an increased opportunity to receive credit against their creditable assessments, allow more handlers to take advantage of crediting under current rules and regulations, and increase almond sales through additional promotions.

Section 981.441(e) currently allows a handler to receive credit for 150 percent of payments made to the Board against the creditable assessment obligation incurred on the first 4,000,000 redetermined kernelweight pounds received by such a handler during a crop year. In addition, the poundage limit is reduced by any poundage on which a handler incurs an obligation and receives 150 percent credit pursuant to the provisions for credit on distribution of sample packages. This proposed rule would remove the volume limitations and allow handlers to receive 150 percent credit for an unlimited tonnage of almonds, subject to the conditions provided for in § 981.441(c), concerning creditable expenditures. Also, the proposed rule would permit handlers to make payments to the Board in installments between January 31 and June 30 of each crop year. Payments would have to be made on a quarterly basis with payments to be made on or before January 31, March 31, May 31, and June 30. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment deadline, credit for payment would revert to the 100 percent basis. Currently the full amount must be paid by January 31.

Both of these proposed changes would give handlers additional flexibility and opportunities to obtain credit against their advertising assessments. This proposed rule would also allow handlers to utilize the 150 percent provision in conjunction with a deferment provision contained in paragraph (b) of § 981.441. Paragraph (b) provides that handlers may receive 100 percent credit against their creditable assessment obligations for their own advertisements published, broadcast, or displayed and other marketing promotion activities conducted during the crop year for which credit is requested (July 1–June 30) except that handlers may receive 100 percent credit up to a maximum of 40 percent of their creditable assessment obligations for such advertisement and promotion activities deferred until no later than December 31 of the subsequent crop year. This proposed rule would allow handlers to receive 100 percent credit for up to 40 percent of their obligation for their own advertising and promotion activities deferred until no later than December 31, while also receiving 150 percent credit for direct payments made to the Board in installments between January 31 and June 30 of each crop year.

This change would give handlers additional flexibility in meeting their assessment obligations and should be particularly beneficial to small handlers. The action might also benefit handlers who, because they have no brand name or because they do not market their almonds in retail outlets, find the current rules concerning crediting for marketing promotion and paid advertising less advantageous to their marketing strategies than handlers who do have a brand name or market their almonds in retail outlets.

Since the inception of the creditable advertising and promotion program in 1972, new activities for which credit may be received have frequently been added to the rules. The Board has attempted to add new activities which would benefit a wide range of handlers who market their almonds in different types of outlets. It is the AMS's view that this action would reduce the costs to handlers of meeting their creditable assessment obligations by making more credit available to more handlers.

The information collection requirements contained in the provisions of the administrative rules and regulations to be revised by the proposed rule have been previously approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB No. 0581–0071.

Based on the above, the Administrator of the AMS has determined that the issuance of this proposed rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 7 CFR Part 981

Almonds, California, and Marketing agreements and orders.

For the reasons set forth in the preamble, 7 CFR Part 981 is proposed to be amended as follows:

PART 981—ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 981 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

Subpart—Administrative Rules and Regulations

2. Section 981.441 is amended by revising paragraph (c)(3)(i); redesignating the current (c)(6)(v) as (c)(6)(v) as (c)(6)(vi) and revising it; adding a new paragraph (c)(6)(vi); and revising paragraph (e) to read as follows:

§ 981.441 Crediting for marketing promotion including paid advertising.

* * * * *

(c) * * *

(3) * * *

(i) For 100 percent of a handler's payment to an advertising medium:

(A) For a generic advertisement of California almonds;

(B) For an advertisement of the handler's brand of almonds;

(C) When either of these advertisements includes reference to a complementary commodity or product;

(D) For a trade media advertisement that displays branded food products containing almonds, or announces a handler's future promotion activities, including joint promotions, and the entire expenditure is borne by the handler; or

(E) For in-store supermarket advertisements using fixed position or video media, when such payments are made through an advertising firm:

(1) Fixed position advertisements must include at least two of the following:

(i) Processed color displays enclosed in plastic frames and mounted on supermarket shopping carts;

(ii) Overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or

(iii) Processed color advertisements enclosed in frames and mounted on a supermarket shelf;

(2) Video advertisements must be shown on a fixed video monitor running television commercials, or infomercials

for specific products on a rotating basis.

* * * * *

(6) * * *

(v) For in-store supermarket advertising, submit a copy of the company invoice, a copy of the actual advertisement or video tape, a published rate card from a nationally recognized company, and a copy of the agency invoice, if any.

(vi) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in § 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

* * * * *

(e) Credit shall be granted for payments made to the Board for use by the Board for generic marketing promotion including paid advertising subject to the following conditions:

(1) A handler may receive credit for 150 percent of a payment made to the Board against the creditable assessment obligation.

(2) When a handler elects to use this method of crediting for all or a portion of such handler's assessment obligation, the handler may use the extension provided for pursuant to paragraph (b) of this section for the handler's deferred advertising and promotion obligation.

(3) Handlers must file claims with the Board on ABC Form 31 in order to receive credit for payments made to the Board. No credit shall be granted unless a claim is filed on or before January 31 of the then current crop year. Payments must be made as follows: One-fourth of total claim on or before January 31; one-fourth on or before March 31; one-fourth on or before May 31; and one-fourth on or before June 30 of the then current crop year. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment deadline of this paragraph, credit for payment shall revert to the 100 percent basis.

Dated: August 24, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 88-19570 Filed 8-26-88; 8:45 am]

BILLING CODE 3410-02-M

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7 CFR Part 1002

[Docket No. AO-71-A76; DA-88-107]

Milk in the New York-New Jersey Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision recommends increasing from four cents to five cents the maximum allowable rate of payment for expense of administration under the New York-New Jersey Federal milk order. The higher maximum allowable rate of payment reflects the increased costs of administering the order that have occurred since it was last adjusted in September 1969.

The recommended action is based on a public hearing held in Syracuse, New York, on June 6, 1988, to consider an industry proposal to amend the marketing order. The hearing was requested by three dairy farmer cooperatives.

DATE: Comments are due on or before September 13, 1988.

ADDRESS: Comments (six copies) should be filed with the Hearing Clerk, Room 1079, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Maurice M. Martin, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-7311.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12291.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities.

The economic impact of the amendment incorporated in this decision will fall on all regulated handlers pro rata to their size of operation. On a unit basis such additional expense is minor (less than 1/1000 of the value of milk handled) and most likely would be translated into the price of the goods that a handler sells. As a result, the action taken here is not expected to have a significant economic impact on a substantial number of small entities.

Prior document in this proceeding:

Notice of Hearing: Issued May 19, 1988; published May 25, 1988 (53 FR 18844).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the New York-New Jersey marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC, 20250, by the 15th day after publication of this decision in the **Federal Register**. Six copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The proposed amendment set forth below is based on the record of a public hearing held at Syracuse, New York, on June 6, 1988, pursuant to a notice of hearing issued May 19, 1988 (53 FR 18844).

The material issue on the record of hearing relates to an increase in the maximum allowable rate of payment for expense of administration.

Findings and Conclusions

The following findings and conclusions on the material issue are based on evidence presented at the hearing and the record thereof:

Expense of Administration

The maximum allowable rate of assessment for expense of administration under Order 2 should be increased to five cents per hundredweight. Such payment should continue to be applicable to the total quantity of pool milk received by the handler from dairy farmers at plants or from farms in a unit operated by the handler directly or at the instance of a cooperative association of producers and on the quantity for which payment is made pursuant to § 1002.70(d)(2).

The Act requires that handlers shall pay the cost of operating an order through an assessment on milk handled. The present maximum allowable rate of payment adopted September 1, 1969, of four cents per hundredweight has not provided sufficient funds since 1980 to cover the administrative expenses necessarily incurred by the market administrator and to maintain a reasonable operating reserve.

The increase was jointly proposed by three dairy farmer cooperatives, namely, Agri-Mark, Inc., Dairylea Cooperative, Inc., and Eastern Milk Producers Cooperative Association (Agri-Mark, Dairylea and Eastern, respectively). Spokesmen for these groups stated that the administrative fund has been operating at a deficit for several years due to supplies of milk leveling off while costs were continuously increasing. Therefore, they proposed that the maximum allowable charge for administering the order be raised to offset such deficit. At the hearing, representatives of two Order 2 handlers, namely, Empire Cheese, Inc., and Sunnydale Farms, gave statements in support of such action.

An indication of an adequate financial status of the administrative fund is an operating reserve adequate to close out the office in the event that the order is terminated. This entails maintaining an operating reserve with a balance within 15 percent of the sum of one-half of a year's total expenses plus one-quarter of a year's salaries and services expense. The New York-New Jersey order has not maintained such a reserve since 1982, and in 1987 the operating reserve was barely one-quarter of that recommended. If such trend were not reversed, then it would be reasonable to expect that the operating reserve would be exhausted by the end of 1989. However, by increasing the maximum allowable rate of assessment to five cents per hundredweight, and charging that amount, it is conceivable, barring any unforeseen escalation of expenses or a reduction in milk receipts of order handlers, that the operating reserve could be brought to an adequate level by the end of 1991.

Total expenses exceeded total income of 1981 by $71,000. However, the operating reserve still exceeded the recommended reserve. In 1982 expenses exceeded income by $215,000 and the operating reserve fell short of the recommended level, but only by five percent. In 1983 expenses exceeded income by $315,000 and the operating reserve was only 72 percent of the recommended reserve, below the 15 percent safety net. From 1983 on (excluding 1984 when the accounting changed to accrual method), annual operating deficits have served to drain the operating reserve. The net accumulated decrease in the administrative fund reserve for the 1983–1987 period has totaled $1,742,893. The operating reserve as of December 31, 1987, was $823,772, only 25.3 percent of the recommended reserve.

This trend could be reversed if either receipts of milk pooled would drastically increase, or expenses would drastically decline, or if the maximum allowable assessment rate is increased. Presently, milk production is declining. In fact, between 1986 and 1987, total receipts of pooled milk under the New York-New Jersey order decreased 3.5 percent. On the other hand, expenses have and are expected to keep pace with the rate of inflation, which between 1983 and 1988 rose 19 percent. Therefore, increasing the maximum allowable assessment rate one cent as proposed is the only sure way of obtaining sufficient funds to administer the New York-New Jersey order.

Opponents to the proposed increase suggested one other alternative to solving the financial problems of administering Order 2, that being to move the main headquarters out of New York City. In their testimony and briefs, representatives of the New Jersey Milk Industry Association, the Dairy Industry Institute, the National Farmers Organization, Inc. (NFO) and Crowley Foods all rejected the idea of increasing the assessment one more penny on the basis that such action would increase handler costs by over one million dollars. The midtown Manhattan address of the market administrator's office was cited as the main reason why the cost of administration under Order 2 is much higher than that under other comparable orders. Rather than raise handlers' and ultimately consumers' costs, these groups suggested that the market administrator's headquarters be moved to a less expensive location which would also be closer to a majority of regulated handlers. Such site would be somewhere beyond 150 miles of New York City because 58 percent of the handlers are located beyond the 150 mile zone. It was even put forth that such a move might result in an actual assessment charge of less than four cents a hundredweight.

The four opponents all suggested that the market administrator promptly institute a search for a new location. The Dairy Industry Institute suggested that an independent professional study be undertaken and that from such study a report on the "wisdom of location in New York City" be given to an advisory group composed of dairy farmers, handlers and government representatives. This group would then join in a recommendation as to location. In the meantime, however, they stated that the maximum assessment charge should remain at four cents.

On the other hand, NFO stated that they would support a temporary increase in the maximum assessment charge while the market administrator conducted a search for new headquarters.

It must be noted that proponent, Dairylea, in its brief, stated that it supported a study to determine a feasible location for the market administrator's office. However, Dairylea still supported an increase in the maximum allowable assessment rate.

The record indicated that in 1983 the market administrator's office was relocated from one Manhattan address to another because it lost its lease in its former location. When determining where to move, several things were considered, including choosing a location that would cause the least amount of disruption to the industry that the office serves. After studying alternative sites in New York City and its suburbs, it was decided that the location that would best accommodate the effective operation of the office and industry needs would be another midtown address. It was believed that a suburban location would have resulted in a loss of trained and experienced employees that would adversely impact on the industry. A suburban location would have meant longer commutes for part of the staff, with most having to come into the City first on their way to the suburban office. The salaries paid by the market administrator were viewed as not enough to entice many of the existing staff to endure such commutes.

With respect to the location of regulated handlers, a majority of the handlers, as opponents indicated, are located 150 miles beyond the City. However, the greatest concentration of large handlers have their corporate headquarters in New York City. The complex books and records of these large handlers, being located at the corporate headquarters require auditors to spend a great deal of time in the City. It is also desirable for other office personnel to keep in close contact with these handlers. These are additional considerations supporting the decision to have the market administrator's office remain in New York City.

In the face of declining milk receipts, the ever increasing office rental expense combined with the other expenses incurred in order to effectively administer the order make it imperative that the maximum allowable assessment rate be increased to five cents per hundredweight.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the New York-New Jersey order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held; and

(d) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as its pro rata share of such expense, five cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1002.90 of the aforesaid tentative marketing agreement and the order as proposed to be amended.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended regulating the handling of milk in the New York-New Jersey marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1002

Milk marketing orders, Milk, Dairy products.

PART 1002—[AMENDED]

1. The authority citation for 7 CFR Part 1002 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 1002.90 is amended by revising the first sentence to read as follows:

§ 1002.90 Payment by handlers.

To share on a pro rata basis the expense of administration of this part, each handler shall, on or before the date specified for making payment to the producer-settlement fund pursuant to § 1002.85, pay to the market administrator a sum not exceeding five cents per hundredweight on the total quantity of pool milk received from dairy farmers at plants or from farms in a unit operated by such handler, directly or at the instance of a cooperative association of producers and on the quantity for which payment is made pursuant to § 1002.70(d)(2), the exact amount to be determined by the market administrator subject to review by the Secretary. * * *

Signed at Washington, DC, on August 23, 1988.

J. Patrick Boyle,
Administrator.

[FR Doc. 88-19517 Filed 8-26-88; 8:45 am]

BILLING CODE 3410-02-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 50

[Docket No. PRM-50-52]

Marvin Lewis; Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of receipt of petition for rulemaking.

SUMMARY: The Nuclear Regulatory Commission is publishing for public comment this notice of receipt of a petition for rulemaking dated June 6, 1988, that was submitted by Marvin I. Lewis. The petition was docketed on June 8, 1988, and assigned Docket No. PRM-50-52. The petition requests that the Commission amend its regulations in 10 CFR Parts 2 and 50 to reinstate financial qualfications as a consideration in the operating licensing hearings for electric utilities.

DATE: Submit comments by October 28, 1988. Comments received after this date will considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington DC, 20555. Attention: Docketing and Service Branch.

For copies of the petition for rulemaking, write: Rules Review and Editorial Section, Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, Nuclear Regulatory Commission, Washington DC, 20555.

FOR FURTHER INFORMATION CONTACT: Juanita Beeson, Chief, Rules Review and Editorial Section, Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, Nuclear Regulatory Commission, Washington DC, 20555, Telephone (301) 492-8926.

SUPPLEMENTARY INFORMATION: .

Background

The Commission published a final rule on September 12, 1984 (49 FR 35747) that eliminated financial qualifications from consideration during the operating license review and hearings for electric utilities. The petitioner states that issuance of this final rule prevents the financial condition of a utility from being investigated during licensing hearings, that the "* * * rule requires the assumption of financial adequacy * * *," which has resulted in several problems that could pose a danger to the public health and safety.

Petitioner's Interest

The petitioner, Marvin I. Lewis, is a reisident of Philadelphia, Pennsylvania, and is concerned about the financial stability of the Philadelphia Electric Company (PECO). PECO is the parent utility for Limerick and Peach Bottom nuclear power plants located in Pennsylvania. Mr. Lewis believes that Limerick 2 may go critical and eventually have to shutdown and that he and residents of the surrounding area will be adversely affected by the shutdown. In addition to being exposed to radiation from the radioactive waste produced by Limerick 2, Mr. Lewis is also concerned about the many costs associated with health risks, rate hikes, and other unknown potential problems.

Grounds for the Petition

Mr. Lewis cites several long-standing operating problems at Limerick 1 and 2 and Peach Bottom plants that he claims have placed a financial burden on PECO. Mr. Lewis asserts that PECO has admitted to being under financial pressure and that the cost of Limerick 1 and 2 has placed the company billions of dollars in debt. Mr. Lewis indicates that the financial problems facing PECO will lead to a situation such as the shutdown of Shoreham nuclear power plant after it became radioactive. Mr. Lewis states that Shoreham was granted a license despite the shaky financial condition of the parent utility, Long Island Lighting Company (LILCO). He claims that LILCO has admitted that it does not have sufficient monies to pay for decommissioning of the nuclear power plant.

General Solution to the Problem

The petitioner requests that NRC reinstate financial qualifications as a requirement for electric utilities and suspend the licensing proceedings for Limerick 2 until the parent utility, PECO, can demonstrate to the NRC that it is financially qualified to safely proceed with Limerick 2 and its other nuclear operations. The petitioner requests that the 30-day comment period for this petition be reduced in order to prevent further financial hardship on PECO.

Conclusion

Mr. Lewis believes that Limerick 2 is going "critical," i.e., will begin to generate power, and may be closed. Even if the plant stays open, Mr. Lewis states that the shipment of radioactive waste will expose him to radiation without corresponding benefit, which he claims is in violation of the Atomic Energy Act. Mr. Lewis states this Act exhorts the Federal Government to protect health and safety of the public and that the Nuclear Regulatory Commission has been charged with enforcing this mandate.

Notice Regarding Petitioner's Request to Reduce 30-day Comment Period

The staff has read the petitioner's letter to waive the 30-day comment period for this notice of petition for rulemaking and determined that it is impractical to do so, therefore we are publishing this notice of receipt of the petition for rulemaking with an opportunity for the public to comment.

Petitioner's Proposal

PART 2—[AMENDED]

The petitioner requests that Part 2 be amended to revise §§ 2.4(s), 2.104(c)(4), and paragraph VII.(b)(4) of Appendix A to reflect the language prior to issuance of the final rule published September 12, 1984 (49 FR 35747).

PART 50—[AMENDED]

The petitioner requests that Part 50 be amended to revise §§ 50.2(x), 50.33(f), 50.40(b), and 50.57(a)(4) to reflect the language prior to issuance of the final rule published September 12, 1984 (49 FR 35747).

Dated at Rockville, MD this 23d day of August 1988.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 88-19542 Filed 8-26-88; 8:45 am]

BILLING CODE 7590-01-M

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10 CFR Part 20

Disposal of Waste Oil by Incineration

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission proposes to amend its regulations to permit the onsite incineration of slightly contaminated waste oils generated at licensed nuclear power plants without the need to specifically amend existing Part 50 operating licenses. This proposed action would help ensure that the limited capacity of licensed regional low-level waste burial grounds is used more efficiently while maintaining releases from operating nuclear power plants at levels which are "as low as is reasonably achievable" as required by 10 CFR Part 50, Appendix I. Incineration of this class of waste would be carried out in full compliance with Commission regulations restricting the release of radioactive materials to the environment that are currently in force at each operating nuclear power plant. This proposed rule, if promulgated, would constitute a partial granting of a petition for rulemaking (PRM-20-15) submitted by Edison Electric Institute and Utility Nuclear Waste Management Group. Other portions of the petition are being denied.

DATE: The comment period expires on October 28, 1988. Comments received after this date will be considered if it is practical to do so, but assurance of consideration can only be given to comments received on or before this date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch. Comments may be delivered to 11555 Rockville Pike, Rockville, MD between 7:30 a.m. and 4:15 p.m. weekdays.

Copies of the petition, the regulatory analysis, and the environmental assessment and finding of no significant impact may be examined and copied for a fee at the NRC Public Document Room at 1717 H Street, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Catherine R. Mattsen, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-3638.

SUPPLEMENTARY INFORMATION:

Background

The Edison Electric Institute (EEI) and the Utility Nuclear Waste Management Group (UNWMG) petitioned the Commission on July 31, 1984 (RPM-20-15) to initiate rulemaking to define a level of radioactive materials in reactor-generated waste oils which would permit disposal of such oils without regard to their radioactive material content. Currently, the only generically approved method of disposal for low-level radioactively contamined oil from nuclear power plants involves solidification or immobilization, packaging, and transportation to and burial at a licensed disposal site. The petition was submitted in response to Commission views expressed in the Supplementary Information statement accompanying publication of 10 CFR Part 61 "Licensing Requirements for Land Disposal of Radioactive Waste" (December 27, 1982; 47 FR 57446). In that statement, the Commission expressed its views that the establishment of standards for waste for which there is no regulatory concern would be beneficial and would, among other things, reduce disposal and long-term disposal site maintenance costs, help preserve the limited capacity of the regional licensed waste disposal sites for the disposal of wastes with higher levels of activity, and enhance overall site stability of disposal facilities by reducing the volume of Class A waste. That view was further advanced when the Commission announced its intent (August 29, 1986; 51 FR 30839) to expeditiously process petitions to exempt specific waste streams from the Commission's regulations. The

Commission subsequently published an Advance Notice of Proposed Rulemaking, ANPRM, (December 2, 1986; 51 FR 43367) soliciting public comments on the broad concepts of defining classes of waste which were "below regulatory concern" (BRC).

The petition, however, predates the Policy Statement and does not include all of the information required for expedited evaluation and handling under the Policy Statement. The petitioners have chosen not to supplement the petition to follow the guidance provided in the Policy Statement.

In the subject petition, the EEI and the UNWMG suggested that an appropriate basis for establishing a cutoff level for determining whether specific waste streams were BRC would be that the direct release of the specific waste streams to the environment would not result in a dose to an individual member of the general public greater than 1 mrem/yr. The petitioners suggested that using a 1 mrem/yr limit, alternative disposal methods, including (1) on- or offsite incineration, (2) on- or offsite burial, (3) road stabilization (spraying), and (4) recycling, could be considered viable alternatives to land burial. The Staff Implementation Plan accompanying the Commission's policy statement published on August 29, 1986 (51 FR 30839) suggested that 1 mrem/yr was low enough to facilitate expedited processing of a petition for exempting a specific waste stream and that higher doses might be acceptable but could require more extensive justification. However, the policy statement and implementation plan dealt with additional criteria which have not been addressed by the petitioners.

After due consideration of the pertinent issues involved, the Commission has concluded that in responding to this petition at this particular time, it would not be appropriate to attempt to make a generic determination as to what level of radioactive contamination in waste oil would constitute a level which is "below regulatory concern." The petition did not supply either adequate information on which to base the selection of a dose criterion for waste oil or an adequate basis for evaluating all of the proposed disposal alternatives. The Commission believes, however, that action on the EEI/UNWMG petition is warranted in view of the very small radiological doses imposed on any member of the public from disposal of waste oil, the potential reduction in fire and toxic risks, the inordinate costs of disposing of this waste material in licensed low level burial grounds, and the need to use the limited burial ground space most efficiently. The Commission is therefore proposing to amend its regulations.

Based on information provided by the petitioners and a Brookhaven National Laboratory report, "Evaluation of Potential Mixed Wastes Containing Lead, Chromium, Used Oil, or Organic Liquids" (NUREG/CR-4730,[1] January 1987), and experience with the few licensees incinerating waste oil under license amendment, the Commission is convinced that, as a class, waste oil generally contains such low levels of radioactive contamination that releases to the general environment from its incineration would have an inconsequential radiological impact on the health and safety of the public, even in combination with other routine reactor effluents. Incineration is a demonstrated disposal technology and one that can be carried out by licensees within already established radiation protection criteria set forth in 10 CFR Part 50, Appendix I. Thus, by maintaining effluents under established limiting conditions for operation, the licensees will continue to maintain doses from effluents that are "as low as is reasonably achievable."

The other disposal methods proposed by the petitioners also appear to have acceptably low radiological impacts. However, adequate information has not been supplied to evaluate the acceptability of these disposal methods. In addition, a number of other considerations limit the desirability of these alternatives in relation to onsite incineration. Some of the more important of these considerations are the following:

1. Because of practical considerations, EPA has recently exempted waste oil from requirements for hazardous waste disposal; however, waste oil does contain a significant amount of toxic constituents. Many of these constituents are combustible and thus are destroyed during incineration, but not through other proposed disposal methods. The remainder of the toxic constituents are metals which remain in the ash residues from incineration. These residues can be disposed of in a controlled manner in the case of onsite incineration. Incineration in industrial boilers is EPA's preferred method of disposal of used oils; thus, incineration is the most acceptable method based on nonradiological considerations. Neither NUREG/CR-4730 nor the information submitted by the petitioners addressed the nonradiological toxic properties of reactor waste oil; thus, this class of impacts from other disposal methods cannot be adequately considered.

2. Concentrations of radionuclides in the ash from incineration and in the sludge from recycling may be too high to exempt an offsite incinerator or a recycling center from requirements for a radioactive materials license. As noted in Consideration 1, the ash residue may also contain significant quantities of toxic metals. These issues were not evaluated by the petitioners.

3. An offsite incinerator or recycling center might handle waste oil for multiple reactors. This factor has not been adequately incorporated into the petitioners' dose analysis.

4. Landfill disposal, although more economical than low-level waste (LLW) burial, requires much of the same processing and handling and would thus result in less cost and risk savings than incineration.

Analysis of Comments

Fourteen comment letters were received on the subject petition (13 from industry and 1 from a private individual). The fourteenth comment letter consisted of the original petitioners' analysis of the other comments received by the Commission and a revised version of the petition. All but one of the commenters supported the idea of exempting slightly contaminated waste oil from the requirements for disposal at an LLW disposal site and most supported the petition in its entirety. Many specifically commented on the excessive cost of disposal at an LLW disposal site relative to the health and safety and environmental impacts of alternative disposal methods. One commenter provided a detailed estimate of LLW disposal costs for waste oil. Consideration of these comments contributed to the commission's decision to provide some relief through an alternative disposal method. However, a few of the commenters raised questions concerning some of the specific disposal methods and concentration limits proposed by the petitioners, such as (1) the concentration of radionuclides in the sludge produced during recycling might be high enough that the recycling center would need a radioactive materials license; (2) consideration should be given to multiple sources of waste oil being handled at one offsite unlicensed incinerator or recycling center; (3) some secondary pathways might be more limiting than those considered by the petitioners; (4) road spraying is prohibited in some areas because of environmental considerations of petroleum products alone; and (5) burial at a landfill will save low-level waste burial space but remains a costly alternative. These and other considerations resulted in the conclusion that incineration onsite was the only clearly acceptable alternative at this time. Although the petitioners addressed these issues in their comment analysis, that analysis was not sufficient.

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[1] Copies of NUREGs may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for inspection and/or copying at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

Other comments were worthy of note. One commenter discussed means of reducing the generation of and the concentration of contaminants in waste oil. Although these methods are likely to be desirable, it is not necessary for the regulations to deal with these specific concepts. Licensees should have flexibility in handling these wastes as long as risks can be kept acceptably low. Several commenters favored the concept of de minimis being applied to other waste streams and regulations. The Commission is currently considering this issue in the context of a potential policy statement that would identify a level of radiation risk below which government regulation becomes unwarranted.

The remaining comments concern details which relate to specific matters that are irrelevant to the proposed course of action; thus, a detailed discussion of these specific comments is not warranted.

The Commission is therefore proposing to grant the petitioner's request only with respect to onsite incineration and to deny the other options without prejudice at this time.

The Proposed Rule

The proposed rule, which would apply all operators of nuclear power plants licensed under 10 CFR Part 50, would allow the onsite incineration of slightly contaminated waste lubricating oils and hydraulic fluids generated onsite without the need to apply for a specific license amendment as is presently required under the provisions of §§ 20.106 and 20.302. The incineration could be carried out either in the licensee's existing auxiliary boiler or incinerator, if available, or in an onsite facility specifically constructed for this purpose. Each licensee would be required to prepare and retain the following types of records in accordance with applicable NRC record retention requirements: (1) A complete description of equipment, facilities, and procedures that will be used to collect, store, determine the radiological components of, and incinerate waste oils; and (2) the results of the radiological and other analyses of each batch of oil discharged through the disposal system which demonstrate that effluents from the facility, including effluents from this operation, are below existing plant discharge limits established under Part 50, Appendix I, as well as § 50.36a.

The first part of this information, the description of equipment and procedures, would be submitted to the Commission under § 50.71(e) as a change to the FSAR since it represents a change to the information submitted in the original license application under § 50.34(b)(2)(i) and (b)(3) and § 50.34a. The second part, the determination of the quantities released, will be reported under existing semiannual effluent reporting requirements. In addition, the requirements of § 50.59 apply. These include the writing of a safety evaluation to assure that the changes do not involve an unreviewed safety question, the submittal of a summary of the changes and of the safety evaluation, and associated recordkeeping.

As noted, the proposed rule does not exempt these effluents from the operating limits developed under Part 50, Appendix I. The licensees are required to demonstrate that all effluents, including those resulting from the incineration of waste oil, meet the effluent dose limits established under Appendix I and are thus "as low as is reasonably achievable." This would be done in practice through a limited modification of the offsite dose calculation manual (ODCM) and the semiannual effluent reports. The ODCM, although not specified in the regulations, is a document required in the technical specifications established under Appendix I, Section IV, paragraph B and § 50.36a which contains the analysis methods to calculate offsite doses from effluents; the additions to the ODCM would be included in the first semiannual effluent report following initiation of incineration. This approach for assessing doses from the effluents from the incineration of waste oil has been used in the case of licensees who have incinerated waste oil under a license amendment. The applicable dose limit in limiting conditions for operations, consistent with the design objective in Appendix I of Part 50, is generally 15 mrem/yr to any organ of an individual in an unrestricted area from radioactive iodine and radioactive material in particulate form. Licensees with existing license amendments allowing incineration of waste oil have been maintaining the contribution from waste oil at 0.1% of the dose limit, or on the order of 15 μrem/yr.

Section 20.305(b)(3) of the proposed rule is included so that a technical specification change, constituting a license amendment, will not be necessary, for example, if a release point other than those identified in the technical specifications is used. This provision will also relieve licensees who have already received a license amendment allowing waste oil incineration from requirements in their license that might be more restrictive than is necessary to conform to the requirements of Appendix I of Part 50.

Since no dose criterion is being chosen and the only releases to the environment being allowed by this action are effluents controlled under existing operating limits, this rule does not strictly constitute a BRC determination. Rather, it only makes an exception to the restriction against incineration without prior approval contained in § 20.305. The decision criteria contained in the BRC policy statement of August 1986 have not been explicitly addressed.

Because the proposed rule would allow a licensee to adopt a potentially more cost- and risk-effective means of disposing of this class of waste while maintaining existing limits on plant effluents, the net impact of this action should be positive. For each licensee, the onetime cost of preparing the appropriate documentation to support an incineration operation should be more than offset by direct first-year savings in waste disposal costs. For those licensees who elect to process waste oils in this fashion, monitoring and maintaining records on waste oil disposal activities would be covered by current regulatory requirements set forth in Part 50, Appendix I, which are implemented primarily through technical specifications established under § 50.36a. Even if a new incinerator is installed exclusively for this purpose, costs could be recovered in a few years. In addition, risk associated with transportation to the LLW burial site are eliminated and toxic and fire hazards associated with storage would likely be reduced. It should be noted that any solid radioactive residues produced in the incineration process would, for purposes of regulation, be treated as any other low-level radioactive solid waste.

Finding of No Significant Environmental Impact: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the

Commission's regulations in Subpart A of 10 CFR Part 51 not to prepare an environmental impact statement for this proposed amendment to 10 CFR 20.305 because the Commission has concluded on the basis of an environmental assessment that this proposed rule, if adopted, would not be a major Federal action signficantly affecting the quality of the human environment.

The proposed rule would allow incineration of waste oil at nuclear power plant sites resulting in very small releases of radionuclides to the environment. Total effluent releases from the plants, including those resulting from waste oil incineration, will be maintained at or below existing plant discharge limits determined to be "as low as is reasonably achievable." Potentially, risks from toxic components in waste oil, fire hazards from storage of oil, and risks inherent in transportation may be somewhat reduced from those associated with the currently available disposal option of burial at LLW disposal sites. Incineration will not require significant quantities of materials, water, or energy and in some cases may involve the recovery of energy. Thus, no significant impact on the environment would result.

The environmental assessment and finding of no significant impact on which this determination is based are published as Appendix A to this document and are available for inspection and copying at the NRC Public Document Room, 1717 H Street NW., Washington, DC. Single copies of the environmental assessment and finding of no significant impact are available from Catherine R. Mattsen, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, (301) 492-3638.

Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget approval number 3150-0011.

Regulatory Analysis

The Commission has prepared a draft regulatory analysis for this proposed rule. That analysis examines the costs and benefits of the alternative courses of action that the Commission considered in responding to the subject petition. The draft analysis is available for inspection at the NRC Public Document Room, 1717 H Street NW., Washington, DC. Single copies of the draft analysis may be obtained from Catherine R. Mattsen, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492-3638.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)) the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121.

Backfit Analysis

This amendment to the Commission's regulations would not impose any new requirements on production or utilization facilities; it only allows incineration of waste oils onsite without the need for specific approval by license amendment. The amendment to 10 CFR 20.305 is therefore not a backfit under 10 CFR 50.109 and a backfit analysis is not required.

List of Subjects in 10 CFR Part 20

Byproduct material, Licensed material, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Packaging and containers, Penalty, Radiation protection, Reporting and recordkeeping requirements, Special nuclear material, Source material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 20.

PART 20—STANDARDS FOR PROTECTION AGAINST RADIATION

1. The authority citation for Part 20 continues to read as follows:

Authority: Secs. 53, 63, 65, 81, 103, 104, 161, 68 Stat. 930, 933, 935, 936, 937, 948, as amended (42 U.S.C. 2073, 2093, 2095, 2111, 2133, 2134, 2201); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 20.101, 20.102, 20.103 (a), (b) and (f), 20.104 (a) and (b), 20.105(b), 20.106(a), 20.201, 20.202(a), 20.205, 20.207, 20.301, 20.303, 20.304, and 20.305 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 20.102, 20.103(e), 20.401-20.407, 20.408(b), and 20.409 are issued under sec. 161(o), 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 20.305 is revised to read as follows:

§ 20.305 Treatment or disposal by incineration.

(a) No licensee shall treat or dispose of licensed material by incineration except:

(1) As authorized by paragraph (b) of this section;

(2) For materials listed under § 20.306; or

(3) As specifically approved by the Commission pursuant to § 20.106(b) or § 20.302.

(b)(1) Waste oils (water immiscible organic hydrocarbons used principally as lubricants or hydraulic fluids) that have been radioactively contaminated in the course of the operation of a nuclear power reactor licensed under Part 50 of this chapter may be incinerated on the site where generated provided that the total radioactive effluents from the facility, including the effluents from such incineration, must conform to the requirements of Appendix I to Part 50 of this chapter. The licensee shall report any changes or additions to the information supplied under §§ 50.34 and 50.34a of this chapter associated with this incineration pursuant to § 50.71 of this chapter, as appropriate. The licensee shall also follow the procedures of § 50.59 of this chapter with respect to such changes to the facility or procedures.

(2) Solid residues produced in the process of incinerating waste oils must be disposed of as provided by § 20.301.

(3) The provisions of this section authorize onsite waste oil incineration under the terms of this section and supersede any provision in an individual plant license or technical specification that may be inconsistent.

(c) Nothing in paragraph (b) of this section relieves the licensee from complying with other applicable Federal, State, and local regulations governing any other toxic or hazardous property of these materials.

Dated at Rockville, Maryland this 19th day of August 1988.

For the Nuclear Regulatory Commission.

Victor Stello, Jr.,

Executive Director for Operations.

Appendix A—Environmental Assessment and Finding of No Significant Impact

Proposed Amendment to 10 CFR 20.305 Disposal of Waste Oil by Incineration

The Nuclear Regulatory Commission is proposing to amend its regulations to allow power reactor licensees to incinerate slightly contaminated waste oil onsite without obtaining the specific approval of the Commission through a license amendment.

Environmental Assessment

Identification of Proposed Action. Present § 20.305 forbids the incineration of any licensed material, except that specifically exempted by § 20.306, without the specific approval of the Commission. The proposed action would amend § 20.305 to allow power reactor licensees to incinerate slightly contaminated waste oil onsite without prior approval. It would not exempt the effluents from this process from the requirements established under Appendix I to Part 50, in particular, effluent limits and effluent monitoring and reporting.

Need for the Proposed Action. The Edison Electric Institute and the Utility Nuclear Waste Management Group petitioned the Commission (PRM–20–15, dated July 31, 1984) to initiate rulemaking to define a level of radioactivity in power-reactor-generated waste oils which would permit disposal of these oils without regard to their radioactive material content. Currently, the only generically approved method of disposal for low-level radioactively contaminated oil from nuclear power plants involves solidification or immobilization, packaging, and transportation to and burial at a licensed disposal site. The cost of this type of disposal is significant, while the concentrations of contaminants are quite low. The waste oil is a potential candidate for being declared a "below regulatory concern" (BRC) waste. Although there is an ongoing action to resolve comments on an Advance Notice of Proposed Rulemaking (December 2, 1986; 51 FR 43367) for a potential generic rule on BRC wastes, a Commission decision on a generic BRC waste rule is not expected in the near future. Also, EPA is considering a similar standard.

Several power reactor licensees have requested and been granted amendments to their licenses to allow onsite incineration of slightly contaminated waste oil. Others are interested in doing so.

Environmental Impacts of the Proposed Action. The primary impact of this rulemaking is to reduce the administrative effort involved in the application for and issuance of amendments to power reactor licenses to allow incineration of waste oil. However, easing these requirements may result in greater amounts of waste oil being incinerated than would otherwise be the case. Thus, the overall impacts of such incineration must be considered.

Some information on the quantities and concentrations of waste oil generated at nuclear power plants was provided in the petition and in a Brookhaven report "Evaluation of Potential Mixed Wastes Containing Lead, Chromium, Used Oil, or Organic Liquids" (NUREG/CR–4730, January 1987). The amounts and concentrations vary considerably from plant to plant and even from year to year at a given plant. Generally, the volumes produced are approximately 1,000 gal/year at a PWR and up to 5,000 gal/year at a BWR. In addition, some utilities have large quantities in storage on site. Cocentrations of radioactive contaminants are typically 10^{-7} to 10^{-5} μCi/ml but can be as high as 10^{-3} μCi/ml in some cases. Total activity per reactor per year is generally no greater than 10^{-4} Ci. The dominant radionuclides are Mn–54, Co–58, Co–60, Cs–134, and Cs–137. Others reported include Sr–90, Cd–109, Zn–65, and Zr–95. It appears that the bulk of waste oil generated, in terms of volume, could be incinerated with resultant individual doses of less than 1 mrem/yr. Licensees with license amendments permitting onsite incineration have been able to dispose of most of their waste oils under a technical specification of 0.1% of the total dose limit, which is generally 15 mrem/yr from radioactive iodine and radioactive material in particulate form (in keeping with the guidance contained in Appendix I of Part 50), or 15 μrem/year. Although waste oil contaminated during reactor operation might eventually be declared "below regulatory concern," this decision is being deferred to the ongoing generic rulemaking on this subject or until a petition following the August 1986 Commission policy is filed. This action modifies the restriction against incineration without prior approval contained in § 20.305 to make an exception for waste oil at power reactor sites; however, it does not exempt the resulting effluents from the requirements of Appendix I of Part 50. These limiting conditions for operation include dose limits for effluents and monitoring and reporting requirements. Although this action may slightly increase actual effluents, the radioactivity in these effluents must be accounted against existing limits for total dose from nuclear power plant effluents which have been determined to satisfy the "as low as is reasonably achievable" criterion.

Impacts from the toxic constituents of used oil would be minimized by onsite incinceration. (See discussion under "Alternatives to the Proposed Action.") Potentially, the proposed action might result in reduced storage of waste oil onsite thus reducing the associated fire hazard. Also, risks inherent in transportation would be reduced from those associated with the currently available disposal option of burial at LLW disposal sites. Incineration will not require significant quantities of materials, water, or energy and in some cases may involve the recovery of energy, e.g., when the oil is burned in an auxiliary boiler.

Based on these considerations, this action will not result in a significant effect on the quality of the human environment.

Alternatives to the Proposed Action. As required by Section 102(2)(E) of NEPA (42 U.S.C. 4322(2)(E)), possible alternatives to the proposed action have been considered. One alternative considered was to defer any action until decisions are made regarding the ongoing generic BRC rulemaking. However, this alternative would be inconsistent with Commission policy adopted in 51 FR 30839 (August 29, 1986). Since it is apparent that the cost to licensees to solidify or immobilize, package, transport, and bury contaminated waste oil at licensed disposal sites is not justified based on the very limited doses from incineration and the fact that other environmental impacts, if anything, will be reduced, and since it is more cost-effective to allow the incineration through rulemaking rather than to continue processing applications for license amendment, this action should be taken rather than delay the relief any further.

Other alternatives were considered which would have granted more of what the petitioners originally requested. However, methods other than onsite incineration would require more complete information and analysis for waste oil. Controlled incineration onsite has been demonstrated to be an acceptable technical alternative for disposal of material. Although there is not sufficient information available to preclude allowing any of the other alternatives in the future, incineration appears to be environmentally preferable to the other proposed alternatives. Although used oil is not listed as a Federal hazardous waste, it does contain a significant amount of toxic substances consisting of various organic compounds and metals. Although there may be some environmental impact from the toxic nature of used oil for any disposal alternative, incineration at a controlled site minimizes these effects and is EPS's preferred method for used oil disposal. The organic components are essentially destroyed by the incineration process and the metals essentially remain in the ash residue. Incineration at a controlled site assures that the disposal of the ash residue can be controlled appropriately considering both its radiologic and toxic constituents. Nationally, any nonradiological environmental effect of disposal of radioactively contaminated used oil from nuclear power plants would be small compared to that associated with the total quantity of used oil disposed. All power plants in total produce on the order of 150,000 gallons/year of such used oil; nationally, vehicle maintenance produces about 700 million gallons/year of used oil.

Any other alternative action to this proposed rulemaking would take longer to complete, thus delaying any relief to licensees and other benefits such as savings in land usage for waste disposal.

Agencies and Persons Consulted. Further consultation has been made with the petitioners (PRM-20-15) concerning this action as a resolution of the petition.

Consideration has also been given to ongoing EPA activities, the 14 comment letters received on the petition, and the Brookhaven report, NUREG/CR-4730.

Finding of No Significant Impact. The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in 10 CFR Part 51, that this proposed amendment to 10 CFR Part 20 to allow the incineration of slightly contaminated waste oil by power reactor licensees onsite, if adopted, would not have a significant effect on the quality of the human environment and that an environmental impact statement is not required. This determination is based on the foregoing environmental assessment performed in accordance with the procedures and criteria in Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions."

[FR Doc. 88-19545 Filed 8-26-88; 8:45 am]

BILLING CODE 7590-01-M

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10 CFR Part 50

Nuclear Plant License Renewal

AGENCY: Nuclear Regulatory Commission.

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: The Nuclear Regulatory Commission (Commission) is developing regulations for extending nuclear power plant licenses beyond 40 years. In order to inform the public, industry and other government agencies of its activities and to solicit timely comments on various regulatory options and issues developed thus far, the Commission is promulgating this notice and requesting comments on NUREG-1317 "Regulatory Options for Nuclear Plant License Renewal."

A free copy of NUREG-1317 may be requested by those considering public comment by writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555. A copy is also available for inspection or copying for a fee in the NRC Public Document Room, 1717 H Street NW., Washington, DC.

DATE: The comment period expires 10/28/88. Comments received after this date will be considered if it is practical to do so but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Mail comments to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

Deliver comments to 11555 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m. Federal workdays.

Examine copies of comments received at: The NRC Public Document Room, 1717 H Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Donald P. Cleary, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492-3556.

SUPPLEMENTARY INFORMATION:

Historical Background

In the early part of the twenty-first century, a significant number of the licenses for the existing operating nuclear power plants are due to expire. Without renewal of these licenses, these plants will be shut down and their generating capacity will be lost. The electric power which would have to be supplied from new generating capacity is substantial. In response to the recognition of this situation and the necessity to address license renewal issues early, the utilities, industry, and the Department of Energy (DOE) are sponsoring programs to study plant life extension for both nuclear and non-nuclear generating plants. The Commission understands that electric utilities may desire to submit applications for renewal of operating licenses beginning in the early 1990s.

The Commission has undertaken a program to develop a regulatory framework which meets the need of utilities to be informed of license renewal requirements sufficiently early so that utilities can either prepare for license renewal or pursue alternative sources of generating capacity. A solicitation for comments on seven major issues (21 separate questions) was published on November 6, 1986, "Request for Comments on Development of Policy for Nuclear Power Plant License Renewal," **Federal Register**, 51 FR 40334 and 40335. A total of 58 written comments were received from a cross-section of the United States which included the electric utility industry, public interest groups, private citizens, independent consultants, and government agencies. These comments were reviewed and a summary provided to the Commission in SECY-87-179, "Status of Staff Activities to Develop a License Renewal Policy, Regulations and Licensing Guidance and to Report on Public Comments,"[1] dated July 21, 1987.

Subsequently, the Commission has decided to by-pass a policy statement and go directly to a proposed rule. As the Commission begins to focus on the integration of analyses of a wide variety of topics into a proposed rule for license renewal, it is worthwhile to provide the opportunity for public comment on the issues and options under consideration. Through this notice the Commission is making NUREG-1317, "Regulatory Options for Nuclear Plant License Renewal," available for public comment.

Comments are solicited on the following questions concerning the content of NUREG-1317. This list of questions is not exhaustive, therefore, comments are welcome on any additional questions raised in NUREG-1317.

1. Are there any other major regulatory options that should be considered for license renewal?
2. What are the relative merits of each option with regard to ensuring the continued adequate protection of the public health and safety?
3. What are the benefits of requiring a licensee to verify his original licensing design basis, as subsequently amended, as a part of the license renewal process?
4. With regard to each of the technological, environmental, and procedural issues, are there any

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[1] SECY-87-179, "Status of Staff Activities to Develop a License Renewal Policy, Regulations and Licensing Guidance and to Report on Public Comments" is available for inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC 20555.

comments or other information that should be considered in their resolution? Comments submitted in response to the November 6, 1986 **Federal Register** notice are already being considered and need not be repeated.

5. Is there interest in participating in a public meeting to discuss the comments received? If held, which issues should be given priority attention in the meeting?

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire prevention, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

The authority citation for this document is:

Sec. 161, Pub. L. 83–703, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, Pub. L. 93–438, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Dated at Rockville, Maryland, this 23rd day of August 1988.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 88–19543 Filed 8–26–88; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88–CE–23–AD]

Airworthiness Directives; Dornier Models Do28D and Do28D–1 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This Notice proposes to adopt a new Airworthiness Directive (AD), applicable to Dornier Models Do28D and Do28D–1 airplanes, which would require inspection of the horizontal tail bearing fitting. Loose rivets and cracks have been reported at rear fuselage frame 10420. The inspection would detect the loose rivets and cracks before the possible loss of the horizontal tail surface and preclude the loss of the airplane.

DATES: Comments must be received on or before December 28, 1988.

ADDRESSES: Dornier Service Bulletin (S/B) No. 1110–3204, dated April 15, 1988, applicable to this AD may be obtained from Dornier GmbH, P.O. Box 2160, D–8000 Munchen 66, Federal Republic of Germany. This information also may be examined at the Rules Docket at the address below. Send comments on the proposal in triplicate to Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 88–CE–23–AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

FOR FURTHER INFORMATION CONTACT: Mr. Heinz Hellebrand, Aircraft Certification Staff, AEU–100, Europe, Africa, and Middle East Office, FAA, c/o American Embassy, B–1000, Brussels, Belgium; Telephone (322) 513.38.30; or Mr. Herman C. Belderok, Project Support Section Foreign Aircraft, Central Region, ACE–109, 601 East 12 Street, Kansas City, Missouri 64106; Telephone (816) 426–6932.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Director before taking action on the proposed rule. The proposals contained in this notice may be changed in the light of comments received. Comments are specifically invited on the overall regulatory, economic, environmental and energy aspects of the proposed rule. All comments submitted will be available both before and after the closing date for comments in the Rules Docket for examination by interested persons. A report summarizing each FAA public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Central Region, Office of the Region Counsel, Attention: Rules Docket No. 88–CE–23–AD, Room 1558, 601 East 12 Street, Kansas City, Missouri 64106.

Discussion

Dornier has received reports of loose rivet connections between the left hand (LH) and right hand (RH) horizontal tail bearing fittings and the lateral skins, and also reports of cracks in frame 10420 and the corner gusset on Models Do28D and Do28D–1 airplanes. If uncorrected, these conditions may cause loss of the horizontal tail bearing fitting or failure of the frame which can lead to the loss of horizontal tail control functions. As a result, Dornier has issued S/B 1110–3204, dated April 15, 1988, which specifies periodic visual inspections and repair as necessary of (a) the rivet connections between the LH and RH horizontal tail bearing fittings and the lateral skins for play; and (b) aft fuselage frame 10420 and the corner gusset for cracks. The Luftfahrt-Bundesamt (LBA), which has responsibility and authority to maintain the continuing airworthiness of these airplanes in the Federal Republic of Germany, has classified this service bulletin and the actions recommended therein by the manufacturer as mandatory to assure the continued airworthiness of the affected airplanes. On airplanes operated under LBA registration, this action has the same effect as an AD on airplanes certified for operation in the United States. The FAA relies upon the certification of the LBA combined with FAA review of pertinent documentation in finding compliance of the design of these airplanes with the applicable United States airworthiness requirements and the airworthiness conformity of products of this type design certificated for operation in the United States. The FAA has examined the available information related to the issuance of Dornier S/B 1110–3204, dated April 15, 1988, and the mandatory classification of this service bulletin by the LBA. Based on the foregoing, the FAA believes that the condition addressed by S/B No. 1110–3204 is an unsafe condition that may exist on other products of this type design certificated for operation in the United States. Consequently, the proposed AD would require initial and subsequent visual inspections every 100 hours time-in-service and repair as necessary of (a) the rivet connections between the LH and RH horizontal tail bearing fittings and the lateral skins for play; and (b) aft fuselage frame 10420 and the corner gusset for cracks.

The FAA has determined there are currently 2 U.S. Registered airplanes affected by the proposed AD. The cost of the visual inspection required by the proposed AD is estimated to be $40 (one man-hour) per airplane. The total cost is estimated to be $80 to the private sector. The cost of compliance with the proposed AD is so small that the expense of compliance will not be a significant financial impact on any small entities operating these airplanes.

The regulations set forth in this notice would be promulgated pursuant to authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt State law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Therefore, I certify that this action (1) is not a "major rule" under the provisions of Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the public docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the FAR as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983); 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new AD:

Dornier: Applies to Models Do28D and Do28D-1 (all serial numbers) airplanes certificated in any category.

Compliance: Required within the next 100 hours time-in-service and every 100 hours time-in-servcie thereafter after the effective date of this AD, unless already accomplished.

To preclude the loss of the horizontal tail, accomplish the following:

(a) Visually inspect in accordance with Dornier Service Bulletin No. 1110–3204, dated April 15, 1986, as follows:

(1) Inspect the rivet connections between the left hand and right hand horizontal tail bearing fittings and the lateral skins for loose rivets. If loose rivets are found, before further flight replace the loose rivets in accordance with Dornier Service Bulletin No. 1110–3204, and

(2) Inspect the rear fuselage frame 10420 and the corner gusset for cracks. If cracks are detected, before further flight repair as follows:

(i) For cracks less than 25mm (.98 inch), stop drill the crack in accordance with Dornier Service Bulletin No. 110–3204.

(ii) For cracks 25mm or longer (.98 inch or more), repair the airplane in accordance with instructions from Dornier approved by the Manager, Aircraft Certification Staff, AEU-100.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An equivalent means of compliance with this AD may be used if approved by the Manager, Aircraft Certification Staff, AEU-100, Europe, Africa and Middle East Office, FAA, c/o American Embassy, B–1000 Brussels, Belgium.

All persons affected by this directive may obtain a copy of the document referred to herein upon request to Aircraft Certification Staff, AEU-100, Europe, Africa, and Middle East Office, FAA, c/o American Embassy, B–1000 Brussels, Belgium; or Dornier GmbH, P.O. Box 2160, D–8000 Munchen 66, Federal Republic of Germany; or may examine this document at the FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

Issued in Washington, DC, on August 18, 1988.

Stephen M. Soffe,

Acting Director, Office of Airworthiness.

[FR Doc. 88–19490 Filed 8–26–88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 85-ASW-17]

Airworthiness Directives; Sikorsky Model S-61L, S-61N, S-61NM, S-61R, S-61A, and S-61V Series Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposed to amend an existing airworthiness directive (AD) which requires frequent inspections of certain Sikorsky Model-S-61 series main rotor blades. The proposal would increase the main rotor (MR) blade eligibility for S-61 helicopter operators who are involved with external load operations. The proposed amendment is needed to provide relief for operators who may have MR blades or spares that are presently ineligible.

DATES: Comments must be received on or before September 28, 1988.

ADDRESSES: Comments on the proposal may be mailed in duplicate to: Rules Docket, Office of the Regional Counsel, FAA, Southwest Region, Fort Worth, Texas 76193–0007, or delivered in duplicate to: Office of the Regional Counsel, FAA, Southwest Region, Room 158, Building 3B, 4400 Blue Mound Road, Fort Worth, Texas. Comments must be marked: Docket No. 85–ASW–17. Comments may be inspected at the Office of the Regional Counsel, FAA, Southwest Region, Room 158, Building 3B, 4400 Blue Mound Road, Fort Worth, Texas, between the hours of 8 a.m. and 4:30 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Donald F. Thompson, Airframe Branch, Boston Aircraft Certification Office, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803, telephone (617) 273–7118.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Director before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket at the address given above for examination by interested persons. A report summarizing each FAA-public contact, concerned with the substance of the proposed AD, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 85–ASW–17." The postcard will be date/time stamped and returned to the commenter.

The FAA is proposing to further amend Amendment 39–5129 (50 FR 38506; September 23, 1985), AD 85–18–05, as amended by Amendment 39–5525 (52 FR 8582; March 19, 1987), AD 85–18–05R1, which currently requires frequent inspections of certain Sikorsky Model S–61 series main rotor blades. After issuing Amendment 39–5129, as amended by Amendment 39–5525, the FAA has determined, based on additional information from the manufacturer and FAA data files, that additional MR blades should also be eligible for use on Sikorsky Model S–61 series helicopters involved in frequent, heavy-lift operations under Part 133 external load operations. This proposed amendment would allow use of additional eligible MR blades by listing additional part and dash numbers for use on certain models. This proposal is relieving in nature and imposes no additional burden.

The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations would not have federalism implications warranting the preparation of a Federalism Assessment.

The FAA has determined that this proposed regulation involves about 12 helicopters engaged in Part 133 external cargo operations and the approximate cost would be reduced by $250,000 for each helicopter by allowing use of existing main rotor blades. Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Southwest Region Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend § 39.19 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.19 [Amended]

2. By further amending Amendment 39–5129 (50 FR 38506; September 23, 1985), AD 85–18–05, as amended by Amendment 39–5525 (52 FR 8582; March 19, 1987), AD 85–18–05R1, by revising paragraphs (a)(1)(iii), (a)(2)(ii), (a)(2)(iii), (a)(2)(iv), and (a)(6); and by adding new paragraphs (a)(1)(iv) and (a)(2)(v) to read as follows:

Sikorsky Aircraft * * *

* * * * *

(a) * * *

(1) * * *

(iii) P/N's S61170–20201–055, –056, –058, –059, –060, –061, –062, –065, and –067.

(iv) P/N's S6117–20101–041, –046, –050, –051, –054, –055, –056, –057, and –058.

(2) * * *

(ii) P/N's S6115–20601–041, –042, –045, –046, –047, and –048.

(iii) P/N's S6188–15001–041, and –045.

(iv) P/N's 61170–20201–054, –055, –056, –058, –059, –060, –061, –062, –065, and –067.

(v) P/N's S6117–20101–041, –046, –050, –051, –054, –055, –056, –057, and –058.

* * * * *

(6) The following blades are approved for Model S–61R transport category helicopters operating up to a combined aircraft and cargo gross weight of 19,500 pounds:

(i) P/N's S6115–20501–041 and –042.

(ii) P/N's S6115–20601–042, and –045 through –048.

(iii) P/N's S6117–20101–041, –050, –051, –054, –056, –057, and –058.

(iv) P/N's S61170–20201–055, –056, –058, through –062, –064, –065, and –067.

Issued in Washington, DC, on August 18, 1988.

Stephen M. Soffe,

Acting Director, Office in Airworthiness.

[FR Doc. 88–19491 Filed 8–26–88; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

Kentucky Permanent Regulatory Program; Public Comment Period and Opportunity for Public Hearing on Amendments to the Kentucky Permanment Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule.

SUMMARY: OSMRE is announcing receipt of proposed amendments to the Kentucky permanent regulatory program [hereinafter referred to as the Kentucky program] under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendments are intended to make the Commonwealth's regulations consistent with revised regulations contained in 30 CFR Chapter VII.

This notice sets forth times and locations that the Kentucky program and the proposed amendments will be available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendments, and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received on or before 4:00 p.m. on September 28, 1988. If requested, a public hearing on the proposed amendments will be held at 10:00 a.m. on September 23, 1988; requests to present oral testimony at the hearing must be received on or before 4:00 p.m. on September 13, 1988.

ADDRESSES: Written comments and requests for a hearing should be mailed or hand deliverd to: W. Hord Tipton, Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504.

Copies of the Kentucky program, the proposed amendments, a listing of any scheduled public meetings, and all comments received in response to this notice will be available for review at the OSMRE Lexington Field Office and at the Office of the Department for Surface Mining Reclamation and Enforcement listed below, during normal business hours, Monday through Friday, excluding holidays. Each requestor may receive, free of charge, one single copy of the proposed amendments by contacting the OSMRE Lexington Field Office:

Office of Surface Mining Reclamation and Enforcement, Lexington Field Office, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504, Telephone: (606) 233–7327

Office of Surface Mining Reclamation and Enforcement, Administrative Record Office, Room 5315 A, 1100 "L" Street, NW., Washington, DC 20240, Telephone: (202) 343–5492

Office of Surface Mining Reclamation and Enforcement, Eastern Field Operations, Ten Parkway Center, Pittsburgh, Pennsylvania 15220, Telephone: (412) 937–2828

Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow Complex, Frankfort, Kentucky 40601, Telephone: (502) 564–6940.

If a public hearing is held, its location will be: The Harley Hotel, 2143 North Broadway, Lexington, Kentucky 40505.

FOR FURTHER INFORMATION CONTACT: Mr. W. Hord Tipton, director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504; Telephone: (606) 233–7327.

SUPPLEMENTARY INFORMATION:

I. Background

The Kentucky program was conditionally approved by the Secretary of the Interior on May 18, 1982. Information pertinent to the general background, revisions, modifications, and amendments to the proposed permanent program submission, as well as the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Kentucky program can be found in the May 18, 1982, **Federal Register** (47 FR 21404–21435). Subsequent actions concerning the conditions of approval and program amendments are identified in 30 CFR 917.11, 917.15, 917.16 and 917.17.

II. Discussion of Amendments

By letter dated February 22, 1985, (Administrative Record No. KY–622) the Director, OSMRE notified Kentucky of State regulations that must be amended to be consistent with revised Federal regulations. The Director's letter, pursuant to 30 CFR 732.17, identified 102 changes needed in the Kentucky regulatory program. A second letter from OSMRE updating the status of Kentucky's regulatory reform, (Administrative Record No. KY–733) was sent to Kentucky on April 7, 1987. This letter identified 46 changes, from the original list of 102, that had not been addressed by Kentucky.

In partial response to the second OSMRE letter Kentucky submitted, on July 15, 1988, (Administrative Record No. KY–812) proposed program amendments affecting 33 regulations contained in the Kentucky permanent regulatory program. The proposed regulations would amend the following Kentucky Administrative Regulations (KAR).

KAR Title 405 Chapter 7—General Provisions for KAR Title 405 Chapters 8 through 24

7:015 Documents incorporated by reference
7:020 Definitions and abbreviations
7:030 Applicability
7:090 Hearings

KAR Title 405 Chapter 8 Permits

8:010 General provisions for permits
8:020 Coal exploration
8:050 Permits for special categories of mining

KAR Title 405 Chapter 10 Bond and Insurance Requirements

10:010 General requirements for performance bond and liability insurance
10:020 Amount and duration of performance bond
10:030 Types, terms and conditions of performance bonds and liability insurance
10:040 Procedures, criteria and schedule for release of performance bond
10:050 Bond forfeiture

KAR Title 405 Chapter 16 Performance Standards for Surface Mining Activities

16:010 General provisions
16:070 Water quality standards and effluent limitations
16:080 Diversions
16:100 Permanent and temporary impoundments
16:110 Surface and ground water monitoring
16:120 Use of explosives
16:150 Disposal of noncoal mine waste
16:190 Backfilling and grading

KAR Title 405 Chapter 18 Performance Standards for Underground Mining Activities

18:010 General provisions
18:070 Water quality standards and effluent limitations
18:080 Diversions
18:100 Permanent and temporary impoundments
18:110 Surface and ground water monitoring
18:120 Use of explosives
18:150 Disposal of noncoal mine waste
18:190 Backfilling and grading

KAR Title 405 Chapter 20 Special Performance Standards

20:010 Coal exploration
20:060 Steep slopes

KAR Title 405 Chapter 24 Areas Unsuitable for Mining

24:020 Petition requirements
24:030 Process and criteria for designating lands unsuitable for surface mining operations
24:040 Areas unsuitable for mining

III. Public Comments Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSMRE is now seeking comment on whether the amendments proposed by Kentucky satisfy the requirements of 30 CFR 732.15 for the approval of State program amendments. If the amendments are deemed adequate, they will become part of the Kentucky program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "**DATES**" or at locations other than the Lexington Field Office, Lexington, Kentucky, will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under "**FOR FURTHER INFORMATION CONTACT**" by the close of business on September 13, 1988. If no requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSMRE officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and who wish to do so will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. A summary of the meeting will be included in the Administrative Record.

Persons wishing to meet with OSMRE representatives to discuss the proposed amendment may request a meeting at the OSMRE, Lexington Field Office listed under "**ADDRESSES**" by contacting the person listed under "**FOR FURTHER INFORMATION CONTACT.**" All such meetings will be open to the public and, if possible, notices of meetings will posted in advance in the Administrative Record. A written summary of each public meeting will be made a part of the Administrative Record.

IV. Procedural Determinations

1. Compliance with the National Environmental Policy Act

The Secretary has determined that, pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

2. Executive Order No. 12291 and the Regulatory Flexibility Act

On July 12, 1984, the Office of Management and Budget (OMB) granted OSMRE an exemption from sections 3, 4, 7 and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule would not impose any new requirements; rather, it would ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

3. Paperwork Reduction Act

This rule does not obtain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 917

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Date: August 15, 1988.

Alfred E. Whitehouse,
Acting Assistant Director, Eastern Field Operations.

[FR Doc. 88-19561 Filed 8-26-88; 8:45 am]
BILLING CODE 4310-01-M

National Park Service

36 CFR Part 7

Rocky Mountain National Park, CO; Trucking Regulations

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to change the trucking regulations in Rocky Mountain National Park since the new fee collection legislation has rendered the existing trucking permit fee schedule obsolete. The proposed rule changes would still allow the Superintendent to issue permits for commercial traucking on park roads by ranchers, farmers and business concerns located in the counties of Larimer, Boulder and Grand, Colorado, when the loads originate and terminate in these counties. This proposed rule will also revise the fee schedule and the permit conditions. With these proposed changes in place, the park staff will be able to more effectively manage the truck traffic on park roads. Effects of the proposed rules are expected to be minimal.

DATE: Written comments will be accepted through September 28, 1988.

ADDRESS: Comments should be addressed to: Mr. James B. Thompson, Superintendent, Rocky Mountain National Park, Estes Park, CO 80517.

FOR FURTHER INFORMATION CONTACT: David J. Essex, Chief Park Ranger, Rocky Mountain National Park, Estes Park, CO 80517. Phone (303) 586-2371.

SUPPLEMENTARY INFORMATION: .

Background

The existing National Park Service (NPS) special regulations that pertain to trucking in Rocky Mountain National Park are codified at 36 CFR 7.7(b) and (e). They allow the Superintendent to issue permits for trucks on park roads, as long as they originate and terminate within the three counties (Grand, Larimer, and Boulder) that surround Rocky Mountain National Park.

The original intent of the trucking regulations was to abide by agreements reached with the State of Colorado years ago when Trail Ridge Road was constructed, to permit trucking on park roads by ranchers, farmers and business concerns located in the three counties surrounding the park. In recent years the number of trucking permits issued under this regulation has decreased considerably. Because of the advent of the new fee legislation which has rendered the present trucking permit fee schedule obsolete, and the low numbers of trucking permit issued, the NPS proposes that a more accurate and simplified schedule of fees for these permits be charged.

Public Participation

The policy of the National Park Service is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule to the address noted at the beginning of this rulemaking.

Drafting Information

The primary authors of these regulations are David Essex, Chief Park Ranger, and Ronald S. Maitland, Visitor Protection Specialist, both of Rocky Mountain National Park.

Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 5501 *et seq.*

Compliance With Other Laws

The Department of Interior has determined that this document is not a major rule under Executive Order 12291 (February 19, 1981), 46 FR 13193, and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Felxibility Act (5 U.S.C. 601 *et seq.*). The economic effects of this rulemaking are local in nature and negligible in scope. The National Park Service has determined that his rulemaking will not have a significant effect on the quality of the human environment, health, and safety because it is not expected to:

(a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

(b) Introduce noncompatible uses which might compromise the nature and characteriistics of the area, or cause physical damage to it;

(c) Conflict with adjacent ownerships or land uses; or

(d) Cause a nuisance to adjacent owners or occupants.

Based on this determination, this proposed rulemaking is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental regulations in 516 DM 6 (49 FR 21438). As such, neither an Environmental Assessment nor an Environmental Impact Statement has been prepared.

List of Subjects in 36 CFR Part 7

National Parks: Reporting and recordkeeping requirements.

In consideration of the foregoing, it is proposed to amend 36 CFR Chapter I as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for Part 7 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 462(k); § 7.96 also issued under DC Code 8-137 (1981) and DC Code 40-721 (1981).

2. In § 7.7, by removing paragraph (e), redesignating paragraph (f) as paragraph (e) and revising paragraph (b) to read as follows:

§ 7.7 Rocky Mountain National Park.

* * * * *

(b) *Trucking permits.* (1) The supreintendent may issue a permit for trucking on park roads when the loads carried originate and terminate in counties of Larimer, Boulder, and Grand, Colorado.

(2) The fee charged for such trucking over Trail-Ridge Road is the same as the single-visit entrance fee for a private passenger vehicle. A trucking permit is valid for one round-trip, provided such trip is made in one day, otherwise the permit is valid for a one-way trip.

(3) The fee provided in this paragraph also applies to a special emergency trucking permit issued pursuant to § 5.6(b) of this chapter.

* * * * *

Susan Recce,

Assistant Secretary for Fish and Wildlife and Parks.

Date: June 24, 1988.

[FR Doc. 88-19527 Filed 8-26-88; 8:45 am]

BILLING CODE 4310-70-M

Notices

Federal Register
Vol. 53, No. 167
Monday, August 29, 1988

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

National Arboretum Advisory Council

According to the Federal Advisory Committee Act of October 6, 1972 (Pub. L. 92–463, 86 Stat. (770–776), the Agricultural Research Service announces the following meeting:

Name: National Arboretum Advisory Council.

Date: October 24–25, 1988.

Time:

8:30 a.m.–4:30 p.m., October 24.

8:30 a.m.–3:30 p.m., October 25.

Place: U.S. National Arboretum, 3501 New York Avenue, NE., Washington, DC.

Type of Meeting: Open to the public. Persons may participate in the meeting as time and space permits.

Comments: The public may file written comments before or after the meeting with the contact person below.

Purpose: To review progress of National Arboretum relating to Congressional mandate of research and education concerning trees and plant life. The Council submits its recommendations to the Secretary of Agriculture.

Contact Person: Howard J. Brooks, Executive Secretary, National Arboretum Advisory Council, Room 234 Bg–005, BARC–W, Beltsville, MD 20705. Telephone: AC 301/344–3912.

Done at Beltsville, Maryland, this 15th day of August 1988.

Howard J. Brooks,

Executive Secretary, National Arboretum Advisory Council.

[FR Doc. 88–19518 Filed 8–26–88; 8:45 am]

BILLING CODE 3410–03–M

Farmers Home Administration

Credit Report Fees

AGENCY: Farmers Home Administration, USDA.

ACTION: Notice.

SUMMARY: The Farmers Home Administration (FmHA) announces that the nonrefundable commercial credit report fee of $31 is being increased to $40. This increase is necessary due to the cost to the Agency in obtaining this report. The nonrefundable commercial credit report fee can be found in FmHA Instruction 1910-C (available in any FmHA field office).

EFFECTIVE DATE: August 29, 1988.

FOR FURTHER INFORMATION CONTACT: Raymond R. McCracken, Senior Loan Officer, Single Family Housing Processing Division, Farmers Home Administration, USDA, Room 5346, South Agriculture Building, 14th and Independence Avenue, SW., Washington, DC 20250, Telephone 202–382–1486.

SUPPLEMENTARY INFORMATION: The Catalog of Federal Domestic Assistance programs affected by this notice are:

10.405	Farm Labor Housing Loans and Grants
10.410	Low-Income Housing Loans (Section 502 Rural Housing Loans)
10.415	Rural Rental Housing Loans
10.418	Water and Waste Disposal Systems for Rural Communities
10.419	Watershed Protection and Flood Prevention Loans
10.423	Community Facilities Loans

Date: June 24, 1988.

Michael C. Wilkinson,

Acting Administrator, Farmers Home Administration.

[FR Doc. 88–19571 Filed 8–26–88; 8:45 am]

BILLING CODE 3410–07–M

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review; Abreu de la Mota and Associates International, Inc. (ADLM)

AGENCY: International Trade Administration, Commerce.

ACTION: Revocation of Export Trade Certificate of Review No. 86–00006.

SUMMARY: The Department of Commerce had issued an export trade certificate of review to Abreu de la Mota and Associates International, Inc. (ADLM). Because the certificate holder has failed to file an annual report as required by law, the Department is revoking the certificate. This notice summarizes the notification letter sent to ADLM.

FOR FURTHER INFORMATION CONTACT: George Muller, Acting Director, Office of Export Trading Company Affairs, International Trade Administration, 202/377–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 ("the Act") (15 U.S.C. 4011–4021) authorizes the Secretary of Commerce to issue export trade certificates of review. The regulations implementing Title III ("the Regulations") are found at 15 CFR Part 325. Pursuant to this authority, a certificate of review was issued on November 17, 1986, to ADLM (application no. 86–00006).

A certificate holder is required by law (section 308 of the Act, 15 U.S.C. 4018) to submit to the Department of Commerce annual reports that update financial and other information relating to business activities covered by its certificate. The annual report is due within 45 days after the anniversary date of the issuance of the certificate of review (§ 325.14(b) of the Regulations). Failure to submit a complete annual report may be the basis for revocation (§§ 325.10(a) and 325.14(c) of the Regulations).

On November 6, 1987, the Department of Commerce sent to ADLM a letter containing annual report questions with a reminder that its annual report was due on January 1, 1988. Additional reminders were sent on January 15 and on January 26, 1988. The Department has received no response from ADLM to any of these letters.

On May 4, 1988, and in accordance with § 325.10(c)(1) of the Regulations, the Department sent a letter by certified mail to notify ADLM that the Department was formally initiating the process to revoke its certificate for its failure to file an annual report. In addition, a summary of these letters allowing ADLM thirty days to respond was published in the **Federal Register** on May 11, 1988 (53 FR 16755). Pursuant to §325.10(c)(2) of the Regulations (15 CFR

325.10(c)(2)), the Department considers the failure of ADLM to be an admission of the statements contained in the notification letter.

The Department has determined to revoke the certificate issued to ADLM for its failure to file an annual report. The Department has sent a letter, dated August 23, to notify ADLM of its determination. The revocation is effective thirty days from the date of publication of this notice. Any person aggrieved by such decision may appeal to an appropriate U.S. district court within 30 days from the date on which this notice is published in the **Federal Register** (§ 325.11 of the Regulations, 15 CFR 325.11).

Date: August 23, 1988.

George Muller,

Acting Director, Office of Export Trading Company Affairs.

[FR Doc. 88-19537 Filed 8-26-88; 8:45 am]

BILLING CODE 3510-DR-M

[Application # 88-00006]

Export Trade Certificate of Review; Global Marketing Associates, Inc.

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of issuance of an export trade certificate of review.

SUMMARY: The Department of Commerce has issued an export trade certificate of review to Global Marketing Associates, Inc. This notice summarizes the conduct for which certification has been granted.

FOR FURTHER INFORMATION CONTACT: John E. Stiner, Director, Office of Export Trading Company Affairs, International Trade Administration, 202-377-5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 ("the Act") (Pub. L. 97-290) authorizes the Secretary of Commerce to issue export trade certificates of review. The regulations implementing Title III are found at 15 CFR Part 325 (50 FR 1804, January 11, 1985).

The Office of Export Trading Company Affairs is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Department of Commerce to publish a summary of a certificate in the **Federal Register**. Under Section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Conduct

Export Trade

X-ray and electro-medical equipment, surgical and medical instruments, surgical appliances and medical supplies, dental equipment and supplies ("surgical and medical products").

Export Trade Facilitation Services (as They Relate to the Export of Products)

Marketing, selling, brokering, consulting, international market research, advertising and sales promotion, product research and design, cooperative bidding, consolidation of shipments, export financing and insurance.

Export Markets

The Export Markets include all parts of the world except the United States (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

Export Trade Activities and Methods of Operation

To engage in Export Trade in the Export Markets, Global is certified to:

(1) Enter into exclusive agreements, each with a single supplier of surgical and medical products and each entered into independently of agreements with other suppliers, wherein:

(a) Global agrees to locate customers for the supplier's surgical and medical products in the Export Markets; and

(b) The supplier agrees, for a specific transaction or for a specified period not to exceed three (3) years, not to sell into the Export Markets or to specific customers in the Export Markets except through Global.

(2) On the basis of agreements with suppliers or customers in the Export Markets, provide or arrange for the provision of Export Trade Facilitation Services. In such agreements, Global may require customers in the Export Markets not to purchase surgical and medical equipment from Global's suppliers except through Global.

(3) Provide to suppliers on an individual basis information on specific solicitations (including price, quantity, specifications, and other terms) by customers in the Export Markets for bids to supply surgical and medical products.

(4) Provide to each supplier on an individual basis:

(a) Information that is already generally available to the trade or public;

(b) Information that is specific to the Export Markets or to a particular Export Market, including, but not limited to, reports and forecasts of sales, prices, terms, customer needs, selling strategies, and product specifications by geographic area and by individual customers in the Export Markets;

(c) Information on expenses specific to exporting to the Export Markets or to a particular Export Market (such as ocean freight, inland freight to the terminal or port, storage, wharfage and handling charges, insurance agents' commissions, export sales documentation and service, and export sales financing);

(d) Information on U.S. and foreign legislation and regulation affecting sales to the Export Markets or to a particular Export Market; and

(e) Information on Global's activities in the Export Markets or in any particular Export Market on the supplier's behalf, including, but not limited to, customers, complaints and quality problems, visits by customers, reports by foreign sales representatives, and other matters concerning the agreement between Global and the supplier.

(5) Assemble, through agreements with suppliers of complementary surgical and medical products, a responsive bid to each solicitation by customers in the Export Markets and, in so doing, set a single price and other terms of sale, including servicing of surgical and medical products.

A copy of this certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, Room 4102, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Date: August 23, 1988.

George Muller,

Acting Director, Office of Export Trading Company Affairs.

[FR. Doc. 88-19538 Filed 8-26-88; 8:45 am]

BILLING CODE 3510-DR-M

[Application # 88-00007]

Export Trade Certificate of Review; Hammerl-Davis International, Inc. ("HDI")

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of issuance of an Export Trade Certificate of Review.

SUMMARY: The Department of Commerce has issued an export trade certificate of review to Hammerl-Davis

International, Inc. ("HDI"). This notice summarizes the conduct for which certification has been granted.

FOR FURTHER INFORMATION CONTACT: George Muller, Acting Director, Office of Export Trading Company Affairs, International Trade Administration, 202-377-5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 ("the Act") (Pub. L. 97-290) authorizes the Secretary of Commerce to issue export trade certificates of review. The regulations implementing Title III are found at 15 CFR Part 325 (50 FR 1804, January 11, 1985).

The Office of Export Trading Company Affairs is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Department of Commerce to publish a summary of a certificate in the **Federal Register**. Under section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Conduct

Export Trade

All industrial and consumer products.

Export Trade Facilitation Services (as they relate to the export of goods and services)

Export management, including, evaluating product market potential, selecting country markets, consulting, developing and implementing export business plans, and assisting clients in introducing products into new export markets or developing new approaches for existing markets; and taking title to goods.

Export Markets

The Export Markets include all parts of the world except the United States (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

Export Trade Activities and Methods of Operation

HDI may:

1. Act as an agent or representative for the export of the Products of individual clients;
2. Take possession of Products in the export of Products of individual clients; and
3. Export the Products of several clients in the same industry on a one-on-one basis.

A copy of the certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, Room 4102, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

George Muller,

Acting Director, Office of Export Trading Company Affairs.

[FR Doc. 88-19539 Filed 8-26-88; 8:45 am]

BILLING CODE 3510-DR-M

Minority Business Development Agency

Business Development Center Applications; Lubbock/Midland-Odessa, TX

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC for a 3-year period, subject to available funds. The cost of performance for the first 12 months is estimated at $194,118 for the project performance of January 1, 1989 to December 31, 1989. The MBDC will operate in the Lubbock/Midland-Odessa, Texas, Standard Metropolitan Statistical Area (SMSA). The first year cost for the MBDC will consist of $165,000 in Federal Funds and a minimum of $29,118 in non-Federal funds (which can be a combination of cash, in-kind contribution and fees for services).

The funding instrument for the MBDC will be a cooperative agreement and competition is open to individuals, non-profit and for-profit organizations, local and state governments, American Indian tribes and educational institutions.

The MBDC will provide management and technical assistance to eligible clients for the establishment and operation of businesses. The MBDC program is designed to assist those minority businesses that have the highest potential for success. In order to accomplish this, MBDA supports MBDC programs that can: coodinate and broker public and private sector resources on behalf of minority individuals and firms; offer them a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be judged on the experience and capability of the firm and its staff in addressing the needs of minority business individuals and organizations; the resources available to the firm in providing management and technical assistance; the firm's proposed approach to performing the work requirements included in the application; and the firm's estimated cost for providing such assistance. It is advisable that applicants have an existing office in the geographic region for which they are applying.

The MBDC will operate for a 3-year period with periodic reviews culminating in annual evaluations to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds, and Agency priorities.

Closing Date: The closing date for receipt of applications is October 1, 1988. Applications must be postmarked on or before October 1, 1988.

ADDRESS: Dallas Regional Office, Minority Business Development Agency, U.S. Department of Commerce, 1100 Commerce, Room 7B23, Dallas, Texas 75242-0790, (214) 767-8001.

FOR FURTHER INFORMATION CONTACT: Deselene Crenshaw, Business Development Clerk, Dallas Regional Office.

SUPPLEMENTARY INFORMATION: Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

A pre-bid conference will be held in Dallas on September 16, 1988 at 1:00 p.m. Conference site information may be obtained by contacting the individual designated above.

Additional RFAs will be available at the conference site.

Melda Cabrera,

Regional Director, Dallas Regional Office.

Date: August 23, 1988.

Project Specifications

Project Indentification

1. Program Number and Title: 11.800 Minority Business Development.
2. Project Name: Lubbock/Midland-Odessa, Texas (Geographic Area or SMSA) MBDC.
3. Project Identification Number: 06-10-89006-01.

Budget Period Duration

1. Budget Period (Check One): First ____ Second ____ Third ____.
2. Start Date: January 1, 1989.
3. End Date: December 31, 1989.

Project Cost

1. Required Federal Funding Level: $165,000.00.
2. Minimum Non-Federal Contribution: $29,118.00.
3. Total Project Cost: $194,118.00.

Project Minimum Performance Goal Levels

1. Combined Financial Package and Procurement Minimum Goal Level: $10,670,000.00.
2. Billable SM&TA Minimum Goal Level: $100,000.00.
3. Number of Clients Minimum Goal Level: $80.

Other Project Specifications

1. Closing Date for Submission of this Application: October 1, 1988.
2. *Geographic Specifications:* The Minority Business Development Center shall offer assistance in the geographic area of: Lubbock/Midland Odessa, Texas.
3. *Eligiblity Criteria:* There are no eligibility restrictions for this project. Eligible applicants may include individuals, non-profit organizations, for-profit firms, local and state governments, American Indian tribes and educational institutions.
4. *Budget Period:* The competitive aware period will be for approximately three (3) years consisting of three (3) separate budget periods. Performance evaluations will be conducted, and funding levels will be established for each of three (3) budget periods. The MBDC will receive continued funding, after the initial competitive year, at the discretion of MBDA based upon the availability of funds, the MBDC's performance and Agency priorities.

[FR Doc. 88-19536 Filed 8-26-88; 8:45 am]

BILLING CODE 3510-21-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Charter; Strategic Defense Initiative Organization Advisory Committee

AGENCY: Revised Charter of the Strategic Defense Initiative Organization Advisory Committee.

SUMMARY: Under the provisions of Pub. L. 92-463, "Federal Advisory Committee Act," notice is hereby given that the Strategic Defense Initiative Organization has been determined to be in the public interest and has been rechartered, effective August 18, 1988. The new charter reflects the incorporation of a provision to allow the establishment of subcommittees which will function under the principal committee.

The Strategic Defense Initiative Organization Advisory Committee provides expert, senior-level advice to the Director, SDIO and other key officials in the Department of Defense on all matters relating to the Strategic Defense Initiative research and technology program, to include, technical content, program emphasis, and schedules. The ultimate goal of the SDI is to determine the feasibility of eliminating the threat posed by nuclear ballistic missiles and increasing the contribution of defensive systems to United States and allied nations security.

August 24, 1988.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 88-19568 Filed 8-26-88; 8:45 am]

BILLING CODE 3810-01-M

Department of the Air Force

USAF Scientific Advisory Board; Meeting

August 22, 1988.

The USAF Scientific Advisory Board Ad Hoc Committee on Munitions Effectiveness will meet on 5-6 October 1988 from 8:00 a.m. to 5:00 p.m. at the Pentagon, Washington, DC 20330-5430.

The purposes of this meeting are to assess the changes in the threat over the past ten years and to study how to take full advantage of potential improvements in munitions that were not possible ten years ago. This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697-4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 88-19505 Filed 8-26-88; 8:45 am]

BILLING CODE 3910-01-M

DEPARTMENT OF ENERGY

Economic Regulatory Administration

Final Consent Order With Texaco, Inc.

AGENCY: Economic Regulatory Administration, DOE.

ACTION: Final action on proposed consent order.

SUMMARY: The Administrator of the Economic Regulatory Administration (ERA) has determined that a proposed Consent Order between the Department of Energy (DOE) and Texaco, Inc. (Texaco) shall be made final as proposed. The Consent Order resolves, with certain exceptions, matters relating to Texaco's compliance with the federal petroleum price and allocation regulations for the period January 1, 1973 through January 27, 1981. To resolve these matters, Texaco will pay the sum of $1.25 billion, plus interest from the effective date of this Consent Order. Persons claiming to have been harmed by Texaco's alleged overcharges will be able to present their claims for refunds in an administrative proceeding before the DOE's Office of Hearings and Appeals (OHA).

In addition to settling Texaco's possible liability for violations arising out of Texaco's sales of crude oil and refined products, the Consent Order incorporates a resolution of Texaco's alleged deficiency in the Injection Well Litigation Escrow Account (Escrow Account) maintained by the court in *In Re: The Department of Energy Stripper Well Exemption Litigation*, M.D.L. 378 (D. Kan.) (*Stripper Well*). After the entry of an Agreed Judgment and Order, attached to the Consent Order as Exhibit A, Texaco will deposit $52 million into the Escrow Account which will be disposed of pursuant to the Final Settlement Agreement in the *Stripper Well* litigation. The Final Settlement Agreement was approved by the district court on July 7, 1986.

The decision to make the Texaco Consent Order final was made after a full review of written comments from the public and the oral testimony received in a public hearing conducted on May 31, 1988.

FOR FURTHER INFORMATION CONTACT: Paul M. Geier, Economic Regulatory Administration, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6727.

SUPPLEMENTARY INFORMATION:

I. Introduction
II. Comments
III. Analysis of Comments
IV. Decision

I. Introduction

On April 27, 1988, ERA issued a notice announcing a proposed Consent Order between DOE and Texaco which, with certain exceptions, would resolve matters relating to Texaco's compliance with federal petroleum price and allocation regulations for the period from January 1, 1973 through January 27, 1981, 53 FR 15106 (April 27, 1988). The proposed Consent Order, which requires Texaco to pay DOE $1.25 billion, plus interest, is for the settlement of Texaco's maximum potential liability of approximately $2.174 billion which includes interest on alleged overcharges. Under the terms of the Consent Order, Texaco will pay this sum in the following manner: Within 30 days of the effective date of the Consent Order, Texaco will pay $348 million to DOE. Texaco will make a second payment to DOE of $190 million, plus interest accrued on unpaid balances from the effective date of the Consent Order, within 18 months after the Consent Order becomes final. Beginning one year thereafter, Texaco will make four equal annual installments of $165 million, plus accrued interest. In addition to the foregoing payments, Texaco will pay $52 million to settle a dispute between DOE and Texaco regarding alleged deficiencies in Texaco's payments into the Escrow Account in the *Stripper Well* litigation. The issue of Texaco's deficiency in that litigation will be resolved by the submission of an Agreed Judgment and Order to the Kansas district court for approval within 25 days of the effective date of the Consent Order.[1]

The April 27 notice provided in detail the bases for ERA's preliminary view that the settlement was favorable to the government and in the public interest. The notice solicited written comments from the public relating to the terms and conditions of the settlement and whether the settlement should be made final. The notice is also announced a public hearing for the purpose of receiving oral presentations on the settlement. The hearing was held on May 31, 1988 at the headquarters of DOE in Washington, DC.

II. Comments Received

ERA receivd six written comments and four oral presentations were made at the May 31, 1988 public hearing. All of the written and oral comments were considered in making the decision as to whether the proposed Consent Order should be made final.

The written and oral comments addressed a number of subject categories. Comments from the following groups addressed certain provisions of the Consent Order and the ultimate disposition or distribution of the Texaco settlement funds:

A joint comment from the following States and Territories and the Attorneys General of four states:

Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin and Wyoming;
Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Guam and the Virgin Islands;
Delaware, Iowa, Louisiana, North Dakota, Rhode Island and West Virginia; and the
Attorney General of Illinois; Attorney General of Oregon; Attorney General of Pennsylvania; and the Attorney General of California (collectively referred to herein as "the States").

A group comprised of the following utilities, transporters and manufacturers:

Consolidated Edison Company of New York, Long Island Lighting Company, Orange and Rockland Utilities, Inc., Pacific Gas and Electric Company, San Diego Gas and Electric Company, Southern California Edison Company; Daiichi Chuo Kisen Kaisha, Flota Mercante Grancolombiana S.A., Globe Trade and Transport Company, Ltd., Island Navigation Corporation (Ship Management) Ltd., Japan Line, Ltd., Kawasaki Kisen Kaisha, Mitsui O.S.K. Lines, Ltd., n.v. Bocimar, s.a., Nippon Yusen Kaisha, The Sanko Steamship Co., Ltd., Shinwa Kaiun Kaisha, Ltd., Showa Line Ltd., Star Shipping A/S, Yamashita-Shinnihon Steamship Co., Ltd.; Champion International Corporation, Federal Paperboard Company, Inc., International Paper Company, and Weyerhauser Company (all of which are collectively referred to herein as "Utilities");

Texaco Marketers Group.

Two other comments addressed only the question of the distribution or disposition of the Texaco settlement funds:

Energy Refunds, Inc. ("ERI")
National Association of Texaco Wholesalers ("NATW")

One comment was received from an individual, Mr. John R. Lynch, which addressed both the provisions of the Consent Order and the adequacy of the overall settlement.

One comment, received from the Louisiana Land & Exploration Company (LLE), addressed the adequacy of the proposed Consent Order and the April 27 Notice of the Proposed Consent Order.

III. Analysis of Comments

The April 27 notice solicited written comments and provided for a public hearing to enable the ERA to receive information from the public relevant to the decision whether the proposed Consent Order should be finalized as proposed, modified or rejected. To ensure public understanding of the basis for the proposed settlement, the April 27 notice provided information regarding Texaco's overcharge liability and the consideration that went into the government's preliminary agreement with the proposed terms. This settlement information enabled the public to address more specifically the areas in which questions or concerns may have existed.

A. Terms of the Consent Order

A number of comments addressed specific provisions of the proposed Consent Order. The Texaco Marketers Group stressed the importance of the Consent Order provision requiring Texaco to preserve customer lists and volumes for use in conjunction with the Subpart V refund proceeding. The Consent Order at Paragraph 601 specifically requires Texaco to retain its records which show customer identity and volumetric purchase information, and to provide such information to DOE upon request. The States' comment inquired whether paragraph 501(c) of the proposed Consent Order, which excludes Texaco's rights concerning claims under 10 CFR Part 205, Subpart V ("Subpart V") from the coverage of the Consent Order, affects Texaco's waiver and release of claims to crude oil funds as set forth in the Final Settlement Agreement in the *Stripper Well* litigation. This issue is covered by paragraph 501(b) of the proposed Consent Order which states that the settlement does not affect Texaco's "rights or obligations" under the Final Settlement Agreement except for a provision not germane to the States' comment.

The comment filed by Mr. Lynch objected to the failure of the government to require interest on the Texaco's installment payments. This is not correct. Paragraph 404 of the Consent Order required Texaco to pay interest at the rate of 8.85% on all unpaid balances and to include such accrued interest in its payments. (The rate of 8.85% per annum was the average of recent prime rates as reported by the Federal Reserve for the first calendar quarter of 1988, within which the Consent Order was executed.)

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[1] Texaco will deposit $52 million in the Escrow Account within 5 business days after the entry of the Agreed Judgment.

The States questioned whether the definition of Texaco in paragraph 203 of the proposed Consent Order could be limited to include only Texaco's subsidiaries and affiliates as of March 10, 1988, the date of the signing of the proposed Consent Order. They make this suggestion so that any company buying or being sold to Texaco, or affiliating at a later date with the firm, would be unable to obtain the benefit of the Consent Order. ERA has concluded that this provision should be modified so as to make clear that the subsidiaries and affiliates included in the definition of Texaco Inc. are limited to those existing as of March 10, 1988, the date on which the proposed Consent Order was executed. ERA believes that this clarification will insure that questions will not arise over the issue of whether a later-acquired subsidiary or affiliate could obtain some benefit from the Consent Order, even though it was not a part of Texaco at the time the proposed Consent Order was signed. The change proposed by the States would accomplish this objective. Texaco and DOE have agreed to a modification of the definition of Texaco found in paragraph 203 of the Consent Order in order to establish March 10, 1988 as the date for determining the subsidiaries and affiliates covered by the Consent Order. Accordingly, the words "as of March 10, 1988" are inserted after the words "including Getty Oil Company" in paragraph 203 of the proposed Consent Order. Paragraph 203, as modified, is set forth at the end of this notice.

B. Distribution Questions

The April 27 notice indicated ERA's view that approximately $120 million of the amounts to be paid by Texaco were attributable to refined product issues and the remainder to crude oil pricing issues. Crude oil monies are governed by the Final Settlement Agreement in the *Stripper Well* litigation. Refined product monies are not so governed and must be dealt with in the context of a separate Subpart V process. The Texaco Marketers, NATW, and ERI, all of whom represent potential claimants with regard to Texaco's product sales, have commented that ERA's figure for refined products is too little, whereas the Utilities, who have lodged substantial refund claims in Subpart V proceedings distributing crude oil monies, have argued that $120 million is an excessive amount for refined product issues. Although the four commenters each disagree with ERA's approximate attribution for refined product issues, the view of each is consistent with a result that increases the share available for the persons they represent rather than because of any error in ERA's determination.[2]

ERA's assessment of the value of refined product and crude oil issues is the result of consideration of the various litigation risks associated with the different cases, the linkage of certain refined product issues which could substantially alter dollar liability amounts, and the relatively early stages of litigation for many of the refined product issues as compared to the crude oil pricing issues.

The OHA may ultimately decide the proportions, but ERA does not believe any persuasive evidence has been offered by these commenters to alter ERA's attribution of settlement proceeds to the refined product and crude oil issues.

Likewise, virtually all the other specific comments on distribution matters are more properly addressed to the OHA rather than ERA. For example, the Texaco Marketers Group and ERI commented favorably upon ERA's recommendation that OHA utilize $120 million of Texaco's first payment for the refined product Subpart V payment. The Texaco Marketers Group further urged ERA to identify the possible overcharges to specific Texaco customers and to allocate a share of the crude oil monies to Sohio's customers who may have been overcharged by Getty. Each of these matters can be resolved by OHA when it devises its Subpart V procedures. Also, the amounts for specific customers can best be determined by OHA in its Subpart V proceeding, not by the ERA.

Other procedural issues for the Subpart V proceedings were raised by the States and the Utilities, which suggested a single filing deadline for the Texaco crude oil claims, and by the NATW which desired a prompt initiation of Subpart V proceedings. ERA intends to promptly file a Petition for the Implementation of Special Refund Procedures after the Consent Order is made final, but it must be left to OHA to address procedural matters such as filing deadlines.

The Utilities' comments also raised a number of issues relating to the disposition of crude oil monies, primarily focusing upon an assertion that the reservation of up to 20% of these monies for a claims procedure would be insufficient to pay claims. They seek to augment the 20% by arguing that the $52 million payable to the Escrow Account in the *Stripper Well* litigation is too much and should be reduced or factored into an adjustment by OHA in calculating overall refunds. On the other hand, the Utilities want $78 million of the crude oil monies to be *removed* by OHA from the claims process and transferred to an escrow account maintained by the Court in *Getty v. DOE*, C.A. No. 77-434 (D.Del.), where the Utilities are presently arguing over the proper disposition of other crude oil funds paid by Getty in 1986. The States disagree with Utilities on the 20% issue, which is also the subject of litigation initiated by the Utilities in several other judicial actions against the DOE and is thereby the subject of ongoing disputes in pending cases. The terms of a particular Consent Order cannot resolve complex matters which are the subject of litigation on the meaning and/or applicability of another agreement.

In general, the disposition of crude oil monies is governed by the Final Settlement Agreement in the *Stripper Well* litigation. More importantly, however, it is neither appropriate nor necessary to resolve disputes about that agreement in the context of the Texaco Consent Order. Specific issues about the adequacy of particular refund formulae should be presented to the OHA which is responsible for Subpart V procedures and decisions.

Both the States and the Utilities commented that DOE should not have agreed to pay 100% of the alleged overcharges relating to the *Stripper Well* litigation into the Escrow Account maintained by the Court. The Utilities also argue that this money should be available for claims, rather than being paid into the Escrow Account. First, it is incorrect that the $52 million represents 100% of the account in issue. The April 27 notice states that a portion of the $52 million is in settlement of a potential issue concerning crude oil sold by in-kind owners other than Texaco. Second, the decision to pay the entire amount attributed to the injection well issues into the Escrow Account is required by the *Stripper Well* Agreement to which DOE and the States, as well as Texaco, are parties.

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[2] ERI incorrectly claims that the April 27 notice describes $307 million in Natural Gas Liquids and Natural Gas Liquid Product overcharges. That amount constitutes the alleged cost overstatements, none of which has been adjudicated by OHA. Neither has it been determined what amount of overcharges would result from only these alleged cost overstatements.

C. Adequacy of the Settlement

Mr. Lynch questioned the overall adequacy of the settlement and had two specific objections: one, that no interest on over charges was obtained and the other, that Texaco should have been required to pay the entire $1.25 billion in one payment. The April 27 notice describes the various cases, and their related overcharges and interest which formed the basis for the settlement with Texaco. The DOE believes that the overall settlement of $1.25 billion, plus interest, is in the public interest and represents a fair and reasonable compromise of numerous cases involving complex issues and regulations. Other than his complaints about interest, Mr. Lynch offers no explanation or support for his claims regarding the adequacy of the settlement. The descriptions of the cases against Texaco in the April 27 notice demonstrate that DOE sought and considered interest on alleged overcharges as part of the $1.25 billion compromise. Texaco indicated that it was not able to make a single payment of $1.25 billion, given the bankruptcy proceeding which was pending at the time of settlement and its obligations to other creditors. See 53 FR 15109, fn.5. In addition, the Consent Order calls for all payments to be completed within five and a half years, whereas the litigation which is resolved by the settlement would not, in all likelihood, be complete until even later.

As noted previously, Texaco will pay interest on any unpaid balances over the entire period of repayment, thereby providing additional compensation. As well, almost 50% of the total required payment will be made within eighteen months of the effective date of the Consent Order. Purchasers of refined products will not be required to wait until the end of the repayment period, but will be able to make claims against the $120 million included in Texaco's initial payment.

Notwithstanding the specific comments addressed above, all of the groups or organizations filing comments supported the overall settlement and urged that the Consent Order be made final.

D. The Federal Register Notice

One brief comment filed by the Louisiana Land and Exploration Company ("LL&E"), a royalty and working interest owner in many of Texaco's crude oil properties, stated that there was insufficient information in the proposed Consent Order and the April 27 notice for the company to form a judgment "as to the effect of the matters" therein. No further explanation was provided by the company for its expressed concern about the effect of the Consent Order provisions. While asserting that insufficient information was provided to allow it to assess the effect of the Consent Order provisions, LL&E has provided no indication or explanation of its concerns which would allow DOE to specifically address the comment. The most important elements affected by the Consent Order are, of course, the resolutions of petroleum price and allocation disputes and Texaco's obligation to pay, but, by its own terms, the Consent Order does not affect the rights or obligations of Texaco with regard to private or unrelated parties—including LL&E.

Finally, the States suggested that ERA might have included a chart of Texaco's banks of refined product costs in the final **Federal Register** notice, but not at the cost of delaying implementation of the agreement. ERA believes this is unnecessary for consideration of the adequacy of the proposed Consent Order. Although the existence of *any* usable amount of regulatory cost banks in certain months or products is instructive for understanding that the amounts of cost disputes do not predictably correlate with the overcharge amounts even in the government's "best case," the total amounts left in the monthly banks after applying all disputed cost reductions are irrelevant to the potential overcharges which DOE considered material in assessing reasonable settlement values.[3]

IV. Decision

By this notice, and pursuant to 10 CFR 205.199J, the proposed Consent Order between Texaco and DOE executed on March 10, 1988, and modified on June 13, 1988, is made a final order of the Department of Energy, effective the date of publication of this notice in the **Federal Register.**

Issued in Washington, DC, on August 25, 1988.

Chandler L. van Orman,

Deputy Administrator, Economic Regulatory Administration.

Modification to Consent Order

Paragraph 203 of the Consent Order is hereby modified in part to read as follows:

203. For purposes of this Consent Order, the phrase "Federal petroleum price and allocation regulations" means all statutory requirements and administrative regulations and orders regarding the pricing and allocation of crude oil, refined petroleum products, natural gas liquids, and natural gas liquid products, including the entitlements and mandatory oil imports programs, administered by the DOE. The Federal petroleum price and allocation regulations include (without limitation) the pricing, allocation, reporting, certification, and recordkeeping requirements imposed by or under the Economic Stabilization Act of 1970, the Emergency Petroleum Allocation Act of 1973, the Federal Energy Administration Act of 1974, Presidential Proclamation 3279, all applicable DOE regulations codified in 6 CFR Parts 130 and 150 and 10 CFR Parts 205, 210, 211, 212, and 213, and all rules, rulings, guidelines, interpretations, clarifications, manuals, decisions, orders, notices, forms, and subpoenas relating to the pricing and allocation of petroleum products. The provisions of 10 CFR 205.199J and the definitions under the Federal petroleum price and allocation regulations shall apply to this Consent Order except to the extent inconsistent herewith. Reference herein to "DOE" includes, besides the Department of Energy, the Cost of Living Council, the Federal Energy Office, the Federal Energy Administration, the Office of Special Counsel (OSC), the Economic Regulatory Administration and all predecessor and successor agencies. References in this Consent Order to "Texaco" shall include: (1) Texaco Inc. and all of its subsidiaries and affiliates, including Getty Oil Company, as of March 10, 1988, (2) all of Texaco's petroleum-related activities as refiner, producer, operator, working interest or royalty interest owner, reseller, retailer, natural gas processor, or otherwise and, except for purposes of Article IV, *infra,* (3) Texaco's directors, officers, and employees.

Dated: June 13, 1988.

I, the undersigned, a duly authorized representative of Texaco Inc., hereby agree to and accept on behalf of Texaco Inc. the foregoing modification to paragraph 203 of the Consent Order.

R. Bruce McLean,

Texaco Inc.

Dated: June 9, 1988.

I, the undersigned, a duly authorized representative of DOE, hereby agree to and accept on behalf of DOE the foregoing modification to paragraph 203 of the Consent Order.

Chandler L. van Orman,

Deputy Administrator, Economic Regulatory Administration.

[FR Doc. 88–19710 Filed 8–26–88; 8:45 am]

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[3] In some Consent Order notices several years ago, DOE published such illustrative "bank charts" because of confusion that might have then existed about the relationship between cost and overcharge issues as they affected settlement valuations. That purpose is effectively achieved by the narrative explanation of such relationships as set forth in the April 27, 1988, Notice of the Texaco proposed Consent Order.

Availability of Draft Environmental Impact Statement Superconducting Super Collider (SSC)

AGENCY: U.S. Department of Energy.

ACTION: Notice of availability of draft environmental impact statement (EIS) and notice to conduct public hearings on the draft EIS.

SUMMARY: The Department of Energy (DOE) announces the availability of the Superconducting Super Collider (SSC) Draft Environmental Impact Statement (DOE/EIS-0138D). The proposed action is to select a site for the construction and operation of the SSC. The seven alternative site locations are in Arizona, Colorado, Illinois, Michigan, North Carolina, Tennessee, and Texas. Following site selection, DOE will prepare a supplemental EIS to address, in more detail, the impacts of constructing and operating the proposed SSC.

Comments on the content of the draft EIS are invited from interested persons, organizations and agencies. Public hearings will be held at a location near each of the seven alternative sites evaluated in the draft EIS.

DATES: Written comments to the DOE should be postmarked by October 17, 1988, to ensure consideration in preparation of the final EIS. Oral comments will be accepted at the public hearings to be held on September 28 and 29, and October 3 and 6 (schedule given below). Individuals desiring to make oral statements at a hearing should notify the DOE's SSC Site Task Force at the address below not later than one week prior to the hearing so that the DOE may arrange a schedule for presentations.

ADDRESS: Requests for copies of the draft EIS, written comments on the draft EIS, requests to present oral comments at the hearings, and requests for further information concerning this draft EIS should be directed to: Dr. Wilmot Hess, Chairman, SSC Site Task Force, ER-65/GTN, Office of Energy Research, U.S. Department of Energy, Washington, DC 20545, Attention: SSC Draft EIS. Requests to present oral comments at the hearings and requests for copies of the draft EIS will also be accepted by telephone at 301-353-6570. For general information on the procedures followed by the DOE in complying with the requirements of the National Environmental Policy Act (NEPA), contact: Carol Borgstrom, Director, Office of NEPA Project Assistance, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, Telephone: 202-586-4600.

SUPPLEMENTARY INFORMATION:

I. Background

The DOE proposes to select a site to construct and operate the SSC. The SSC project is being proposed for the study of the basic structure of matter. The proposed SSC would be the largest scientific instrument ever constructed. Its major feature would be an oval tunnel approximately 53 miles in circumference. Two beams of protons (subatomic particles) would be accelerated in opposite directions to velocities near the speed of light and then made to collide at energies of up to 40 trillion electron volts.

Research and development for the SSC project has been conducted as a national scientific effort under the guidance of the Central Design Group (CDG), an organizational entity of Universities Research Association, Inc.

The Reference Design Study, completed in March 1984, established the basis for design of the SSC. The CDG completed the Conceptual Design Report (CDR) in 1986 which led to the conclusion that the SSC was technically feasible and that cost and schedule estimates were acceptable. In January 1987, the President proposed construction of the SSC to the Congress. Construction of the SSC is anticipated to cost $4.4 billion in fiscal year 1988 dollars and would be completed during the mid-1990's.

The SSC is expected to remain in operation for 25 to 30 years after construction. After completion of its useful life, the SSC would be decommissioned. Additional review, in accordance with the NEPA, will be completed prior to a decision on decommissioning.

On April 1, 1987, the DOE issued an Invitation for Site Proposals (ISP) for the SSC. In response, 43 proposals were received and reviewed by the DOE; of these, 36 were further evaluated by the National Academy of Sciences and the National Academy of Engineering (NAS/NAE). Based upon criteria listed in the ISP, design details of the proposals, and specific characteristics of the sites, the NAS/NAE recommended to the DOE a Best Qualified List (BQL) of sites to be considered further. These sites were presented to the DOE on December 24, 1987. One of the recommended BQL sites was subsequently withdrawn by the proposing organization. Following a review and validation of the NAS/NAE recommendation, the BQL was accepted by the DOE and announced on January 19, 1988. The proposals for these seven sites, as provided in response to the ISP, form the seven site alternatives considered in this draft EIS.

II. EIS Preparation

The DOE published a Notice of Intent (53 FR 1821) on January 22, 1988, announcing its intent to prepare an EIS on the SSC. The DOE received approximately 2,100 written comments on the proposed scope of the EIS. The scoping process also included public meetings held near each of the proposed alternative sites; comments given at scoping meetings were documented through transcripts. Comments were considered in preparation of the draft EIS.

The draft EIS evaluates and compares four types of alternatives: (1) Site alternatives (the seven locations identified on the Best Qualified List), (2) technical alternatives (different technology, equipment, or facility configuration), (3) programmatic alternatives (using other accelerators, international collaboration, or project delay), and (4) the no action alternative (the option not to construct the SSC). This draft EIS identifies and analyzes the potential environmental consequences expected to occur from siting, construction, and operation of the SSC at seven site alternatives. Residual impacts are examined to identify and analyze possible mitigation measures to be applied through final site design.

This draft EIS provides as much information as possible at this stage of the project development regarding the potential environmental impacts of the proposed construction and operation of an SSC at each of the alternative sites. However, DOE recognizes that further review under NEPA is required prior to construction and operation of the proposed SSC. Accordingly, following selection of a site for the proposed SSC, the DOE will prepare a supplement to this EIS to address, in more detail, the impacts of constructing and operating the proposed SSC at the selected site and alternatives for mitigating those impacts.

III. Floodplains/Wetlands Notification

Pursuant to Executive Order 11988, Floodplain Management, and 11990, Protection of Wetlands, and 10 CFR Part 1022, Compliance with Floodplains/Wetlands Environmental Review Requirements, DOE hereby provides notice that the construction and operation of the proposed SSC may impact surface waters and adjacent floodplain or wetland areas at any of the seven alternative sites. Identified surface waters at each of the alternative sites are as follows:

Arizona Site—Maricopa County

Although there are no perennial streams and no defined floodplains, the following major washes may be affected.

- West Branch Waterman Wash
- Bender Wash

Colorado Site—Adams, Morgan, and Washington Counties

- Beaver Creek
- Shears Draw
- Antelope Creek
- Sand Creek
- Plum Bush Creek
- Wetzel Creek
- Badger Creek

Illinois Site—Kane, Dupage, and Kendall Counties

- Welch Creek
- Blackberry Creek
- Fox River
- Waubansee Creek
- Kress Creek
- Norton Creek

Michigan Site—Ingham and Jackson Counties

- Sycamore Creek
- Mud Creek
- Deer Creek
- Doan Creek
- Grand River
- Batteese Creek
- Orchard Creek
- Portage Creek

North Carolina Site—Person, Granville, and Durham Counties

- Flat River
- South Flat River
- North Flat River
- Knap of Reeds Creek
- Mayo Creek
- Tar River

Tennessee Site—Bedford, Marshall, Rutherford, and Williamson Counties

- West Fork Stones River
- Lytle Creek
- Dry Fork Creek
- Fall Creek
- North Fork Creek
- Spring Creek
- Harpeth River
- Overall Creek
- Armstrong Branch

Texas Site—Ellis County

- Chambers Creek
- South Prong Creek
- Waxahachie Creek
- North Prong Creek
- Red Oak Creek
- Grove Creek
- Mustang Creek
- Big Onion Creek

The potential environmental impacts of site selection on these surface waters and adjacent floodplain and wetland areas are discussed in Chapter 5 and Appendices 7 and 11 of the draft EIS. Any comments regarding the proposed action on floodplains and wetlands may be submitted to DOE in accordance with procedures described below.

IV. Comment Procedures

A. Availability of Draft EIS

As announced in the **Federal Register** on June 17, 1988, copies of the draft EIS, including its approximately 4,000 pages of appendices, have been distributed to Federal, State, and local agencies; copies of the draft EIS without the separately-bound appendices have been distributed to organizations, environmental groups, and individuals known to be interested in or affected by the proposed project. Additional copies of either the main document or any appendix may be obtained by contacting the DOE at the address given above.

Copies of the draft EIS, including appendices, and major documents referenced in the draft EIS are available for inspection at the DOE's reading rooms and at the public libraries in the vicinity of the seven alternative sites. The locations where SSC-related documents are available are as follows:

1. DOE Reading Rooms

—Freedom of Information Reading Room, Room 1E-190, U.S. DOE, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585

—Public Reading Room, Chicago Operations Office, 9800 South Cass Avenue, Argonne, IL 60439

—Public Reading Room, Oak Ridge Operations Office, Federal Building, P.O. Box E, Oak Ridge, TN 37831

2. Public Libraries

a. Arizona

—Noble Science and Engineering Library, Arizona State University, Tempe, AZ 85287-1506

—Phoenix Public Library, 12 E. McDowell Road, Phoenix, AZ 85004

b. Colorado

—Fort Morgan Public Library, 414 Main Street, Fort Morgan, CO 80701

—East Morgan County Library, 500 Clayton Street, Brush, CO 80723

c. Illinois

—Illinois SSC Project Office, c/o Illinois State Water Survey, 101 North Island Avenue, Batavia, IL 60510

—Aurora Public Library, 1 East Benton Street, Aurora, IL 60506

—St. Charles Public Library, 1 South 6th Avenue, St. Charles, IL 60174

—Kaneville Township Library, c/o Kaneville Civic Center, P.O. Box 5, Main Street and Harter Road, Kaneville, IL 60144

—West Chicago Public Library, 332 East Washington Street, West Chicago, IL 60185

d. Michigan

—Ingham County Library System, Library Service Center, 407 North Cedar Street, Mason, MI 48854

—Jackson District Library System, 244 West Michigan Avenue, Jackson, MI 49201

e. North Carolina

—Richard H. Thornton Library, Spring and Main Street, Oxford, NC 27565

—Durham County Library, 300 South N. Roxboro Street, Durham, NC 27701

—Roxboro Library, 307 South Main Street, Roxboro, NC 27573

f. Tennessee

—Linebaugh Public Library, 110 West College, Murfreesboro, TN 37130

—Tennessee Department of Economic and Community Development Library, 320 6th Avenue, North, 8th Floor, Rachel Jackson Building, Nashville, TN 37219-5308

g. Texas

—Sims Library, 515 West Main Street, Waxahachie, TX 75665

—Ennis Public Library, 501 West Ennis Avenue, Ennis, TX 75119

B. Written Comments

Interested parties are invited to provide comments on the content of the draft EIS to the DOE at the above address. Envelopes should be marked "Attention: SSC Draft EIS Comments." Comments should be postmarked no later than October 17, 1988, to ensure consideration in preparing the final EIS. Comments postmarked after October 17, 1988, will be considered to the extent practicable.

C. Public Hearings

1. Participation Procedure

The public is also invited to provide comments on the draft EIS to the DOE in person at the scheduled public hearings. The purpose of the hearings is to receive substantive comments related to the draft EIS. It is not the purpose of the hearings to receive either general endorsements or criticisms of the project. The hearings will not be judicial or evidentiary-type hearings. Advance registration for presentation of oral comments at the hearings will be accepted up to one week prior to the hearing date by telephone or by mail at the office listed above. "Attention: SSC Draft EIS Hearing Registration." Requests to speak at a specific time will be honored, if possible. Registrants are allowed to only register themselves to speak and must confirm the time they are scheduled to speak at the registration desk the day of the hearing. Persons who have not registered in advance may register to speak at the hearings to the extent time is available. To ensure that as many persons as possible have the opportunity to present comments, 5 minutes will be allotted to each speaker. Persons presenting comments at the hearing are requested to provide the DOE with written copies of their comments at the hearing, if possible.

2. Hearings Schedules and Locations

Hearings will be held from 2 to 5 p.m. and 7 to 10 p.m. at each of the following locations on dates indicated:

September 26, 1988

Stockbridge High School Gymnasium, 416 North Clinton Street, Stockbridge, Michigan

Southwestern Assemblies of God College, Administration Building, W.B. McCafferty Auditorium, 1200 Sycamore Street, Waxahachie, Texas

September 29, 1988

Fort Morgan High School, Auditorium, 709 E. Riverview Avenue, Fort Morgan, Colorado

Middle Tennessee State University, James Union Building, Tennessee Room, East Main Street, Murfreesboro, Tennessee

October 3, 1988

Butner Sports Arena, 24th Street, Butner, North Carolina

Arizona State University College of Law, Great Hall, Intersection of McAllister and Orange, Tempe, Arizona

October 6, 1988

Waubonsie Valley High School, Auditorium, 2590 Route 34, Intersection of Rt. 34 and Eola Road, Aurora, Illinois

An additional session will be held on the day following the scheduled date, if requests for presentation of comments received by the week before the hearing are so extensive that the time needed to accommodate registered speakers would exceed the time available on the scheduled date. Such additional sessions will be announced both prior to and at the scheduled hearings.

3. Conduct of Hearings

The DOE has established basic rules and procedures for conducting the hearings. Rules needed for the orderly conduct of the hearings will be announced by the presiding officer at the start of the hearings. Clarifying questions regarding statements made at the hearings may be asked only by DOE personnel conducting the hearings. There will be no cross-examination of persons presenting statements. A transcript of the hearings will be prepared, and the entire record of each hearing, including the transcript, will be retained by the DOE for inspection at libraries and reading rooms listed above.

Issued in Washington, DC, August 24, 1988.

Ernest C. Baynard III,

Assistant Secretary, Environment, Safety and Health.

[FR Doc. 88-19815 Filed 8-26-88; 8:45 am]

BILLING CODE 6450-01-M

Office of Conservation and Renewable Energy

[Docket: RCS Standby State Case; Puerto Rico]

Residential Conservation Service (RCS); Public Hearing on Adequacy of Implementation of Puerto Rico Electric Power Authority Plan

AGENCY: Office of Conservation and Renewable Energy, DOE.

ACTION: Notice of public hearing.

SUMMARY: The Department of Energy's (DOE) current information on the Puerto Rico Electric Power Authority (a non-regulated utility) Residential Conservation (RCS) program, under the National Energy Conservation Policy Act (NECPA), as amended (42 U.S.C. *et seq.*) suggests that the program is not being adequately implemented. Pursuant to 10 CFR 456.602(d) DOE announces a public hearing on the status of the Puerto Rico Electric Power Authority RCS program.

DATES: The public hearing will be held on October 20, 1988. Requests to speak at the hearing must be received no later than October 14, 1988. Requests should contain the person's name, address and telephone number and any organizational affiliation. Oral presentations will be limited to the issue of the adequacy of the implementation of the Puerto Rico Electric Power Authority RCS plan. Please bring five (5) copies of the oral statement to the hearing.

ADDRESSES: The hearing will be held at Federico Degetau Federal Building and U.S. Court House, Room CH 155 (Courthouse Building, 1st Floor), Carlos Chardon Avenue, Hato Rey, Puerto Rico 00918, and begin at 9:30 a.m. All requests to speak at the hearing should be addressed to: Office of Conservation and Renewable Energy, Hearings and Dockets Branch, Room 6B-025, RCS Standby State Case: Puerto Rico Electric Power Authority, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9320. The transcript of this hearing will be available for inspection at the Freedom of Information Public Reading Room, 1E-190, Mail Stop MA-232.1, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-6020, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Edna Jones, CE-222, Residential and Commercial Conservation Program, Office of Conservation and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-8224.

SUPPLEMENTARY INFORMATION: Under the RCS program established by Title II of NECPA (42 U.S.C. 8211 *et seq.*), "covered" electric and natural gas utilities are required to offer to their residential customers energy audits and certain other related services. A utility is "covered" by the program in any calendar year if during the second preceding calendar year it had sales of natural gas or electric energy, for purposes other than resale, in excess of 10 billion cubic feet or 750 million kilowatt hours, respectively (42 U.S.C. 8282).

Pursuant to DOE regulations, 10 CFR 456.404(a), a non-regulated utility may elect to participate in the RCS program by submitting a plan for DOE approval. The plan must show how the utility intends to implement the RCS program. Generally, if a utility does not have an approved plan or if DOE determines, after notice and opportunity for a public hearing, that an approved plan is not being adequately implemented, DOE is required to invoke Federal Standby. DOE regulations also provide, as an alternative to RCS, the waiver process. This procedure enables a utility to obtain a waiver from any RCS requirement, subject to certain findings described in 10 CFR 456.1203. The waiver request is subject to a hearing and must be supported by the Governor (or his designee).

DOE's current information on the Puerto Rico Electric Power Authority RCS program suggests that the program is not being implemented in accordance with the RCS plan approved by DOE in January 1981. Correspondence with utility officials in February of 1988 indicate that the RCS Plan, as approved, was not being properly implemented. Since questions of adequate implementation have not been resolved concerning the Puerto Rico Electric Power Authority's approved RCS plan, DOE is obligated to hold a hearing so that the utility and any interested persons may present relevant information. Subsequent to the hearing, DOE will consider all relevant views and data submitted and will issue a final determination, accompanied by a statement of the basis for its determination. If the final determination is to implement the Federal Standby Plan, DOE will order the Puerto Rico Electric Power Authority to implement the Federal Standby Plan within 90 days of the order.

Issued in Washington, DC, on August 23, 1988.

Donna R. Fitzpatrick,

Assistant Secretary, Conservation and Renewable Energy.

[FR Doc. 88-19569 Filed 8-26-88; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket No. CI64-1053-001, et al.]

Tenneco Oil Co., et al.; of Applications for Certificates, Abandonment of Service and Amendment of Certificates [1]

August 23, 1988.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to sell natural gas in interstate commerce, to abandon service or to amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before September 15, 1988, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Acting Secretary.

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[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No. and date filed	Applicant	Purchaser and location	Description
CI64-1053-001, D, 7-29-88	Tenneco Oil CO., P.O. Box 2511, Houston, TX 77252.	Arkla Energy Resources, a division of Arkla, Inc., Longstreet Field, De Soto Parish, LA.	(1)
CI88-549-000, E, 8-8-88	Tenneco Oil Co	ANR Pipeline Co., Cedardale NE Field, Woodward County, OK.	(2)
CI88-553-000 (CI61-16), 7-29-88	do	Panhandle Eastern Pipe Line Co., Mocane-Laverne Field, Beaver County, OK.	(3)
CI88-554-000 (G-10670), D, 8-1-88	do	Williams Natural Gas Co., Gordon #1-25 Well, NE/4 Section 25-T28N-R6W, Grant County, OK.	(4)
CI88-555-000 (CI79-367), D, 8-2-88	Multistate Oil Properties, N.V., P.O. Box 2511, Houston, TX 77001.	ANR Pipeline Co., Campbell East Field, Major County, OK.	(5)
CI88-556-000 (CI60-650), D, 8-4-88	Texaco Producing Inc., P.O. Box 52332, Houston, TX 77052.	Texas Gas Transmission Corp., Sugar Creek Field, Claiborne Parish, LA.	(6)
CI88-560-000 (CI71-439), B, 8-8-88	Texaco Producing Inc	Tennessee Gas Pipeline Co., Grand Isle Block 63, Offshore Louisiana.	(7)
CI88-561-000 (CI76-202), B, 8-8-88	do	Tennessee Gas Pipeline Co., Grand Isle Block 45, Offshore Louisiana.	(8)
CI88-564-000 (CI70-180), D, 8-10-88	ARCO Oil & Gas Co., Division of Atlantic Richfield Co., P.O. Box 2819, Dallas, TX 75221.	Transwestern Pipeline Co., Adobe Barstow Area, Ward Country, TX.	(9)
CI88-565-000 (CI76-393), D, 8-10-88	do	Transwestern Pipeline Co., EC State Field, Eddy County, NM.	(10)
CI88-566-000 (CI76-331), D, 8-10-88	do	El Paso Natural Gas Co., Parkway West Unit, Eddy County, NM.	(9)
CI88-567-000 (CI87-378), D, 8-10-88	Amoco Production Co., P.O. Box 3092, Houston, TX 77253.	Transwestern Pipeline Co., Kermit Field, Winkler County, TX.	(11)
CI88-570-000 (CI85-638), D, 8-15-88	OXY USA Inc., P.O. Box 300. Tulsa, OK 74102	Williston Basin Interstate Pipeline Co., Pavillion Field, Fremont County, WY.	(12)
CI88-572-000, A, 8-15-88	OXY USA, Inc	Trunkline Gas Co., South Timbalier Block 52, Offshore Louisiana.	(13)

[1] Effective January 1, 1977, Tenneco assigned its interest in certain acreage to Kalda Company. Tenneco also assigned certain acreage to G.R. Goodwill. Five other leases were surrendered by Tenneco's predecessor.

[2] Tenneco acquired certain interests from Robert B. Lambert, effective December 31, 1987.

[3] Effective December 1, 1986, Tenneco assigned its interests in certain acreage to Mesa Operating Limited Partnership and to PNG Operating Company.

[4] By assignment executed April 26, 1984, effective May 1, 1984, Tenneco assigned its interest in the acreage attributable to the Gordon #1-25 Well to Vernon E. Faulconer.

[5] Effective November 1, 1986, Multistate assigned its interests in certain acreage to Prentice, Napier & Green.

[6] TPI assigned to Sugar Creek Producing Company its interest in certain leases by assignment dated May 11, 1988, effective September 1, 1987. No active leases remain under the contract.

[7] OCS Lease No. G-1054 expired June 22, 1987.

[8] OCS Lease No. G-1582 expired April 30, 1988.

[9] ARCO assigned certain interests to Hondo Oil & Gas Company, effective January 1, 1987.

[10] ARCO assigned certain interests to Yates Petroleum Corporation, effective January 1, 1987.

[11] Amoco assigned certain interests to Petrus Management Corporation, General Partner of Petrus Oil Company, L.P., effective February 1, 1987.

[12] Cities Service Oil and Gas Corporation, OXY's predecessor, assigned certain interests to Wind River-Pavillion, Ltd. by various assignments dated March 3, 1988, and effective December 1, 1987.

[13] Applicant is filing for its own certificate to cover its interest in a sale previously covered by the operator, Chevron U.S.A. Inc., under its certificate in Docket No. CI68-1241 and related FERC Gas Rate Schedule No. 44.

Filing Code: A—Initial Service. B—Abandonment. C—Amendment to add acreage. D—Amendment to delete acreage. E—Total Succession. F—Partial Succession.

[FR Doc. 88-19555 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP87-61-003]

Eastern Shore Natural Gas Co.; Proposed Changes in FERC Gas Tariff

August 25, 1988.

Take notice that Eastern Shore Natural Gas Company (ESNG) tendered for filing on August 19, 1988, certain revised tariff sheets included in Appendix A attached to the filing. Such tariff sheets are proposed to be effective October 23 and November 1, 1987; May 1, June 1 and August 1, 1988, respectively.

ESNG states that the purpose of the filing is to revise ESNG's sales, storage, and transportation rates to reflect the cost allocation and rate design methodology approved for the ESNG system by the Commission in the *Order approving Settlement* issued on April 20, 1988 in Docket No. RP87-61-000. The instant filing is submitted in accordance with Article VII of the Stipulation and Agreement as filed on November 9, 1987.

ESNG states that copies of the instant filing are being mailed to its jurisdictional customers and interested State Commissions. In accordance with the provisions of § 154.16 of the Commission's Regulations, copies of this filing are available for public inspection during regular business hours, in a convenient form and place at ESNG's main office at 861 Silver Lake Boulevard, Cannon Building—2nd Floor, Dover, Delaware 19901.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 and Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before September 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19551 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP85-58-021 and TA85-1-33-010]

El Paso Natural Gas Co.; Tariff Filing

August 23, 1988.

Take notice that El Paso Natural Gas Company ("El Paso"), on August 17, 1988, tendered for filing pursuant to Part 154 of the Federal Energy Regulatory Commission's ("Commission") Regulations Under the Natural Gas Act, Article IX of the Stipulation and Agreement at Docket No. RP85-58-000, *et al.*, and in compliance with ordering paragraph (B) of the Commission's order issued May 18, 1988 at Docket Nos. TA85-1-33-004, TA84-1-33-001, and TA84-2-33-013, certain tariff sheets which reflect a reduction in jurisdictional sales rates. Such tariff sheets are identified on the appendix, for inclusion in El Paso's FERC Gas Tariff, Original Volume No. 1, First Revised Volume No. 1, Third Revised Volume No. 2 and Original Volume No. 2A.

El Paso states that prior to October 1, 1983, El Paso priced its company-owned production on a cost-of-service basis. As a result of using the Commission-approved normalization method of reflecting income tax expenses, El Paso accumulated $100,266,469 in deferred tax reserves associated with its company-owned production as of October 1, 1983. In accordance with Commission policy, El Paso credited those reserves against its rate base. As a result of the issuance of the Supreme Court's *Mid-Louisiana* decision, and El Paso's Settlement Agreement at Docket No. RP82-33, effective October 1, 1983, El Paso began to price its company-owned production on the basis of the Natural Gas Policy Act of 1978 ("NGPA"). As a result, beginning on that date, all expenses incurred by El Paso in connection with such production were excluded from El Paso's rates and no longer charged to its customers. A disagreement remained, however, concerning the treatment of the balance of accumulated deferred tax reserves associated with the production as of October 1, 1983. El Paso states that by order issued May 18, 1988 at Docket Nos. TA85-1-33-004, *et al.*, the Commission adopted what it termed an "equitable solution," returning the parties to their respective positions prior to removal of the subject properties from the rate base and thus directed El Paso to credit its deferred tax reserve to its rate base.

El Paso further states that the Commission, in its July 18, 1988 order in this proceeding, addressed El Paso's concerns that the May 18, 1988 order would place El Paso in danger of forfeiting its right to use accelerated depreciation. The Commission also recognized that if their decision impacted El Paso, the Commission had the power to take remedial action. On August 12, 1988, El Paso failed a ruling application and request for expenditious handling with the Internal Revenue Service regarding the tax consequences of the Commission's May 18, 1988 order. El Paso requested that the Commission delay action on the tariff sheets pending an indication from the IRS on El Paso's ruling request.

Copies of El Paso's filing were served upon all parties of record in Docket Nos. RP85-58-000, *et al.*, and TA85-1-33-000, *et al.*, and otherwise upon all interstate pipeline system customers of El Paso and all interested state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211). All such motions or protests should be filed on or before August 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19552 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-233-000]

Panhandle Eastern Pipe Line Co.; Tariff Filing

August 25, 1988.

Panhandle states that this tariff sheet which reflects a revision to Panhandle's Rate schedule PT-Firm governing firm transportation service is requested to be effective April 1, 1988. This tariff sheet clarifies procedures attendant to the CD conversion rights afforded to Panhandle's existing sales customers in accordance with § 246.10 of the Commission's Regulations.

Copies of this letter and enclosures are being served on all jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before September 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19553 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-181-002]

Sea Robin Pipeline Co.; Filing of Revised Tariff Sheets

August 23, 1988.

Take Notice that on August 16, 1988, Sea Robin Pipeline Company (Sea Robin) tendered for filing the following substitute tariff sheets, related thereto:

Original Volume No. 1

Substitute Fifty-Second Revised Sheet No. 4
Substitute Twenty-Seventh Revised Sheet No. 4-A
Substitute Fifth Revised Sheet No. 4-A1
Substitute Fifth Revised Sheet No. 4-A2
Substitute Second Revised Sheet No. 4-C

Original Volume No. 2

Substitute Thirty-Fifth Revised Sheet No. 127-D
Substitute Thirty-Fifth Revised Sheet No. 135-C

Sea Robin states that this filing is made pursuant to Ordering Paragraph (C) of the Order of the Federal Energy Regulatory Commission (Commission) issued in Docket No. RP88-181-000, et al., on June 30, 1988.

Sea Robin states the filing amends its May 31, 1988 filing to reflect rates based on a Demand-1 Component allocated upon actual three-day peak deliveries and a Demand-2 Component based upon Demand-2 Billing Determinants nominated by customers as of July 15, 1988. Additionally, other gas supply expenses in Sea Robin's cost of service have been allocated to the commodity charge.

Sea Robin's Substitute Fifth Revised Sheet No. 4-A2 has been revised to clarify that the minimum reservation charge is zero and that the authorized overrun rate will never be less than the rate for interruptible transportation service.

Sea Robin has also revised Substitute Second Revised Sheet No. 4-C to include language to implement a 100% load factor charge for takes in excess of a customer's nominated D2 Billing Determinants.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in such accordance with §§ 385.214 and 385.211 of the Commission's regulations. All such motions or protests should be filed on or before August 30, 1988.

Protests will be considered by the Commission in determining appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19554 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-142-001]

Tennessee Gas Pipeline Co.; Tariff Filing

August 25, 1988.

Take notice that on August 18, 1988, Tennessee Gas Pipeline Company (Tennessee) tendered for filing the following tariff sheets to Second Revised Volume No. 1 of its FERC Gas Tariff, to be effective June 1, 1988:

Third Revised Sheet No. 219
Fourth Revised Sheet No. 220
Fourth Revised Sheet No. 221
Fourth Revised Sheet No. 222
Third Revised Sheet No. 223
Third Revised Sheet No. 224
Second Revised Sheet No. 225
Second Revised Sheet No. 226
First Revised Sheet No. 226A

Tennessee states it is revising the Purchased Gas Adjustment clause of its tariff, Article XXIII of the General Terms and Conditions, to comply with the letter order of the Director of OPPR issued on July 21, 1988, in the referenced docket.

Tennessee states that copies of the filing have been mailed to all of its customers and affected state regulatory commissions. Any persons desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, Washington DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions protests should be filed on or before September 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene; provided, however, that any person who had previously filed a motion to intervene in this proceeding is not required to file a further motion. Copies of this filing are on file with the Commission and are available for public inspection.

Lois Cashell,

Acting Secretary.

[FR Doc. 88-19556 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-180-002]

Trunkline Gas Co., Compliance Filing

August 23, 1988.

Take notice that Trunkline Gas Company on August 15, 1988, tendered for filing certain revised tariff sheets in compliance with Ordering Paragraphs (B), (D), and (E) of the Commission's Order dated June 30, 1988 and the Notice of Extension of Time issued July 29, 1988 in this matter.

Trunkline states that copies of its filing have been served on all parties, jurisdictional customers and appropriate state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before August 30, 1988. Protests will be considered by the Commission in determining the appropriate actions to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19557 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP88-124-001, RP88-124-002, TM88-1-11-002]

United Gas Pipe Line Co.; Filing of Revised Tariff Sheets

August 25, 1988.

Take notice that on August 8, 1988, United Gas Pipe Line Company (United) tendered for filing certain tariff sheets and on August 19, 1988 tendered for filing an amendment to its August 8, 1988 filing to include additional tariff sheets inadvertently not included in the August 8, 1988 filing.

United states that Tariff Sheet Nos. 74–C through 74–F2a are being filed to incorporate the appropriate language in section 19 of United's General Terms and Conditions to satisfy the requirements specified in the Commission's Letter Order at July 8, 1988. In addition, United is filing Substitute Revised Eightieth Revised Sheet No. 4 and Substitute Second Revised Eightieth Revised Sheet No. 4 to incorporate the column heading changes required by the July 8, 1988 Letter Order.

United states that these substitute tariff sheets will be mailed to its jurisdictional sales customers and to interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1988)). All such motions or protests should be filed on or before September 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19558 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-123-001]

Valero Interstate Transmission Co.; Filing

August 25, 1988.

Take notice that on August 15, 1988, Valero Interstate Transmission Company (Vitco) filed the following tariff sheets to its FERC Gas Tariff, to be effective June 1, 1988:

Original Volume No. 1

Substitute 2nd Revised Sheet No. 21.8
Substitute 2nd Revised Sheet No. 21.9

Original Volume No. 2

Substitute 2nd Revised Sheet No. 10
Substitute Original Sheet No. 12.1

Vitco states that this filing is made in accordance with the directions of the Letter Order of June 23, 1988, issued by the Director, Office of Pipeline and Producer Regulation.

Vitco requests waiver of a filing fee under § 381.106 by incorporating by reference the financial statements in the FERC Form 2A as support. Vitco protests the application of any fee to this filing, requests that the Letter Order be treated as an informal request, states that the corrections to these tariff sheets did not change the intent of the original tariff but only served to clarify the intention, and protests that the fee is not relative to the cost of processing the submission of the four corrected tariff sheets.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1988)). All such motions or protests should be filed on or before September 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19559 Filed 8-26-88; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3435-9]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and is available to the public for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

FOR FURTHER INFORMATION CONTACT: Carla Levesque at EPA, (202) 382-2740.

SUPPLEMENTARY INFORMATION:

Office of Solid Waste and Emergency Response

Title: Notification of Oil or Hazardous Substance Release. (EPA ICR # 1049).

Abstract: Persons in charge of a facility or vessel from which there has been a release of a CERCLA hazardous substance that equals or exceeds the reportable quantity, or from where there has been a discharge of oil, must immediately report the incident to the National Response Center (NRC).

Burden of Statement: Reporting burden for this collection of information is estimated to average 2 hours per response, this includes the time to review the regulatory requirements, the time spent by the plant manager in calling the NRC, and time spent by any other staff in communicating with the NRC or any other federal, state or local agency.

Respondents: Facilities or vessels releasing a CERCLA hazardous substance or oil discharge.

Estimated No. of Respondents: 33,816 (including, 24,816 hazardous substance releases and 9,000 petroleum releases).

Frequency of Collection: On occasion

Total Estimated Annual Burden: 67,632 hours.

Send comments regarding the burden estimates, or any other aspects of this collection of information, including suggestions for reducing these burdens, to:

Carla Levesque, U.S. Environmental Protection Agency, Information Policy

Branch (PM-223), 401 M St., SW.,
Washington, DC 2046;
and
Marcus Peacock, Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, NW., Washington, DC 20503, (Telephone (202) 395-3084).

OMB Responses to Agency PRA Clearance Requests

EPA ICR # 0814; Information Requirements for Hazardous Waste Storage and Treatment Facilities; was approved 08/08/88; OMB # 2050-0009; expires: 01/31/91.

EPA ICR # 0246; Contractor Cumulative Claim and Reconciliation; was approved 08/08/88; OMB # 2030-0016; expires: 07/31/89.

EPA ICR # 0287; Report of Nonexpendable Government Property Acquired by Contractor; OMB # 2030-0009, has been discontinued as of 07/12/88.

Date: August 18, 1988.

Paul Lapsley,

Director, Information and Regulatory Systems Division.

[FR Doc. 88-19533 Filed 8-26-88; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirements Submitted to the Office of Management and Budget for Review

August 22, 1988.

The Federal Communications Commission has submitted the following information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507.

Copies of these submissions may be purchased from the Commission's duplicating contractor, International Transcription Service, 2100 M Street, NW., Suite 140, Washington, DC 20037, or telephone (202) 857-3815. Persons wishing to comment on an information collection should contact Eyvette Flynn, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, telephone (202) 395-3785. Copies of these comments should also be sent to the Commission. For further information contact Jerry Cowden, Federal Communications Commission, telephone (202) 632-7513.

OMB No.: 3060-0185

Title: Section 73.3613, Filing of Contracts.

Action: Extension.

Respondents: Bussiness, including small business.

Frequency of Response: Recordkeeping requirement and reporting on occasion.

Estimated Annual Burden: 3,717 Recordkeepers, 30 minutes each, 1,800 Respondents, 30 minutes each.

Needs and Uses: Licensees of TV and low power TV broadcast stations are required to file network affiliation contracts with FCC. All broadcast station licensees are required to file contracts relating to ownership or control and personnel. Certain contracts must be retained at the station. The data are used by Commission staff to assure that licensee maintains full control over the station.

OMB No.: 3060-0346

Title: Section 78.27, License Conditions.

Action: Extension.

Respondents: Business, including small business.

Frequency of Response: On occasion.

Estimated Annual Burden: 500 Responses, 10 minutes each.

Needs and Uses: Licensees of Cable Television Relay Service stations are required to notify the FCC when the station commences operation, and to request additional time to complete construction when necessary. The data are used by Commission staff to provide accurate records of actual CARS channel usage for frequency coordination purposes.

Federal Communications Commission.

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-19514 Filed 8-26-88; 8:45 am]

BILLING CODE 6712-01-M

[Report No. 1744]

Petitions for Reconsideration of Actions in Rulemaking Proceedings

August 22, 1988.

Petitions for reconsideration have been filed in the Commission rule making proceeding listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of these documents are available for viewing and copying in Room 239, 1919 M Street, NW., Washington, DC, or may be purchased from the Commission's copy contractor, International Transcription Service (202-857-3800). Oppositions to these petitions must be filed.

See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Amendment of Subpart C of Part 90 of the Commission's Rules to Permit Commercial Enterprises to be Licensed Directly in the Special Emergency Radio Service. (PR Docket No. 87-312, RM-5662) Number of petitions received: 2.

Subject: Amendment of § 73.202(b) Table of Allotments, FM Broadcast Stations. (Saint Robert, Missouri) (MM Docket No. 87-378, RM-5927) Number of petitions received: 1.

Federal Communications Commission.

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-19513 Filed 8-26-88; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL HOME LOAN BANK BOARD

[No. AC-730; FHLBB No. 3880]

Decatur Federal Savings and Loan Association Decatur, GA, Final Action; Approval of Conversion Application

Date: August 22, 1988.

Notice is hereby given that on August 5, 1988, the Office of the General Counsel of the Federal Home Loan Bank Board, acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of Decatur Federal Savings and Loan Association, Decatur, Georgia, for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Office of the Secretariat at the Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552, and at the Office of the Supervisory Agent at the Federal Home Loan Bank of Atlanta, 1475 Peachtree Street, NE., Atlanta, Georgia 30309.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-19574 Filed 8-26-88; 8:45 am]

BILLING CODE 6720-01-M

[No. AC-733] FHLBB No. 6905]

First Federal Savings and Loan Association of Chilton County, Clanton, AL, Final Action; Approval of Conversion Application

Date: August 22, 1988.

Notice is hereby given that on August 12, 1988, the Office of the General Counsel of the Federal Home Loan Bank Board acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of First Federal Savings and Loan Association of Chilton County, Clanton, Alabama, for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Office of the Secretariat at the Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552, and at the Office of the Supervisory Agent at the Federal Home Loan Bank of Atlanta, 1475 Pechtree Street, NE., Atlanta, Georgia 30309.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-19575 Filed 8-26-88; 8:45 am]

BILLING CODE 6720-01-M

[No. AC-732 FHLBB No. 1523]

First Federal Savings Bank of Richmond, Richmond, KY, Final Action Approval of Conversion Application

Date: August 22, 1988.

Notice is hereby given that on August 12, 1988, the Office of the General Counsel of the Federal Home Loan Bank Board acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of First Federal Savings Bank of Richmond, Richmond, Kentucky for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Office of the Secretariat at the Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552, and at the Office of the Supervisory Agent at the Federal Home Loan Bank of Cincinnati, 2000 Atrium TWO, 221 E. 4th Street, Cincinnati, Ohio 45202.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-19576 Filed 8-26-88; 8:45 am]

BILLING CODE 6720-01-M

[No. AC-731; FHLBB No. 1910]

Sturgis Federal Savings Bank, Sturgis, MI; Final Action; Approval of Conversion Application

Date: August 22, 1988.

Notice is hereby given that on August 10, 1988, the Office of the General Counsel of the Federal Home Loan Bank Board, acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of Sturgis Federal Savings Bank, Sturgis, Michigan for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Office of the Secretariat at the Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552, and at the Office of the Supervisory Agent at the Federal Home Loan Bank of Indianapolis, 1350 Merchants Plaza, South Tower, 115 West Washington Street, Indianapolis, Indiana 46204.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-19577 Filed 8-26-88; 8:45 am]

BILLING CODE 6720-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

National Center for Health Services Research and Health Care Technology Assessment; Intermittent Positive Pressure Breathing Therapy; Re-announcement of Assessment

IPPB therapy consists of the use of a pressure-limited respirator to deliver a gas with or without humidity and/or an aerosol solution at various intervals to assist a patient in breathing. OHTA previously published a notice of assessment in the **Federal Register** volume 51 #116: 21984 June 17, 1986. Additional information is sought as to the risks and benefits associated with the use of this mode of treatment. Information is also sought pertaining to the advantages and disadvantages of IPPB in the treatment of acute bronchospasm or chronic obstructive pulmonary disease or other forms of lung disease. We also seek information regarding other uses of IPPB either as a therapeutic modality or as a preventive measure against pulmonary complications following abdominal surgery. Specifically, we wish to determine if this treatment method offers any advantages over using a compression nebulizer of a metered-dose inhaler with or without B-agonists. We also seek information about IPPB clinical results as compared to deep breathing exercises or incentive spirometry as well a comparison of complications with the use of a hand-held nebulizer. Finally, are there conditions or circumstances under which IPPB is not only a reasonable and necessary therapy but is the preferred therapy?

PHS assessments consist of a synthesis of information obtained from appropriate organizations in the private sector and from PHS and other agencies in the Federal government. PHS assessments are based on the most current knowledge concerning the safety and clinical effectiveness of a technology. Based on this assessment, PHS recommendation will be formulated to assist the Health Care Financing Administration (HCFA) in establishing Medicare coverage policy. The information being sought is a review and assessment of past, current, and planned research related to this technology, a bibliography of published, controlled clinical trials and other well-designed clinical studies. Information related to the characterization of the patient population most likely to benefit from it, as well as on the clinical acceptability and the effectiveness of this technology and the extent of use is also being sought. Proprietary information is not being sought. Any person or group wishing to provide OHTA with information relevant to this assessment should do so in writing no later than November 30, 1988 or 90 days from the date of publication of this notice.

Written material should be submitted to: Kesinee C. Nimit, M.D., Office of Health Technology Assessment, 5600 Fishers Lane, Room 18A-27, Rockville, MD 20857, (301) 443-4990.

Date: August 19, 1988.

Enrique D. Carter,

Director, Office of Health Technology Assessment, National Center for Health Services Research and Health Care Technology Assessment.

[FR Doc. 88-19563 Filed 8-26-88; 8:45 am]

BILLING CODE 4160-17-M

National Toxicology Program (NTP) Board of Scientific Counselors' Meeting; Review Draft NTP Technical Reports

Pursuant to Pub. L. 92-463, notice is given of the next meeting of the NTP Board of Scientific Counselors Technical Reports Review Subcommittee and associated *ad hoc* Panel of Experts (*Peer Review Panel*) on October 3 and 4, 1988, in the Conference Center, Building 101, South Campus, National Institute of Environmental Health Sciences, 111 Alexander Drive, Research Triangle Park, North Carolina. The meeting will begin at 9:00 a.m. on both days and is open to the public. The primary agenda topic is the peer review of draft Technical Reports of long-term toxicology and carcinogenesis studies from the National Toxicology Program.

Tentatively scheduled to be peer reviewed on October 3 and 4 are draft technical reports of studies on the following chemicals, listed alphabetically, along with Chemical Abstracts Service registry numbers, responsible staff scientists with telephone numbers, NTP report numbers, uses, routes of administration, exposure levels used in the chronic studies, and tentative levels of evidence of carcinogenic activity (see table below). All studies were done using Fischer 344 rats and $B6C3F_1$ mice unless noted. Levels of evidence of carcinogenic activity proposed by NTP staff are included to provide more information in advance of the meeting. The tentative order of review is given in the far left column of the table.

Persons wanting to make a formal presentation regarding a particular Technical Report must notify the Executive Secretary and provide a written copy in advance of the meeting so copies can be made and distributed to all Panel members, staff, and attendees. Presentations must be limited to no more than 5 to 10 minutes.

Those interested in having more information about any of the studies listed in this announcement, or wanting to provide input, should contact the particular NTP staff scientists as early as possible by telephone or by mail to: NIEHS, P.O. Box 12233, Research Triangle Park (RTP), North Carolina 27709. The staff scientists would welcome receiving toxicology and carcinogenesis data from completed, ongoing or planned studies by others as well as current production data, human exposure information, and use and use patterns.

The Executive Secretary, Dr. Larry G. Hart, NTP, P.O. Box 12233, RTP, North Carolina 27709, telephone (919–541–3971), FTS (629–3971), will furnish final agendas, a roster of subcommittee and panel meetings, and other program information prior to the meeting, and summary minutes subsequent to the meeting.

Attachment.

Dated: August 22, 1988.

David P. Rall,

Director, National Toxicology Program.

Tentative order of review	Chemical/CAS No.	Study scientist/ technical report No.	Use	Exposure levels	Laboratory	Proposed levels of evidence of carcinogenicity [1]
6	Bromoethane (ethyl bromide) 74–96–4.	Dr. J. Roycroft, 919–544–3627 TR 363.	Alkylating agent, chemical intermediate, refrigerant, solvent.	inhalation: R&M: 0,100,200,400 PPM.	Battelle Northwest Laboratory.	MR: Equivocal evidence. Adrenal gland (pheochromo-cytoma). FR: Equivocal evidence. Brain (Glioma). MM: Equivocal evidence. Lung (Alveolar/bronchiolar adenoma or carcinoma). FM: Clear evidence. Uterus (endometrial adenoma or adenocarcinoma, squamous-Cell carcinoma).
7	Chloroethane (ethyl chloride) 75–00–3.	Dr. J. Roycroft, 919–541–3627 TR 346.	Alkylating agent, chemical intermediate, topical anesthetic, refrigerant, solvent.	Inhalation: R&M: 0, 15000 PPM.	do	MR: Equivocal Evidence. Skin (Trichoepithelioma, sebaceous gland adenoma, or basal cell carcinoma). FR: Equivocal evidence. Brain (Astrocytoma). MM: Inadequate experiment. FM: Clear evidence. Uterus (endometrial Carcinoma).
4	Dimethoxane 828–00–2.	Dr. K. Abdo 919–541–7819 TR 354.	Preservative oils, cosmetics, inks, water-based paints; in adhesives, textile chemicals; gasoline additive.	Oral gavage (corn oil) MR: 0, 62.5, 125, FR: 0,125,250, M: 0, 250,500 MG/KG.	do	MR: No evidence. FR: No evidence. MM: Equivocal evidence. Forestomach (squamous cell papilloma, squamous cell carcinoma). FM: No evidence.
5	Diphenhydramine hydrochloride 147–24–0.	Dr. R. Melnick, 919–541–4142 TR-355.	Antihistamine	Oral in feed: MR: 0, 313,625, FR&M: 0, 156,313 PPM.	SRI International	MR. Equivocal evidence. Brain (astrocytoma or Glioma) lung (alveolar/bronchiolar adenoma or carcinoma). FR: equivocal evidence. Pituitary gland (adenoma). MM: No evidence. FM: No evidence.
2	Hexachloroethane 67–72–1.	Dr. W. Eastin, 919–541–7941 TR-361.	Plasticizer, moth repellant, anthelmentic, ignition suppressant, pressure lubricant component.	Oral, gavage (corn oil): MR: 0, 10, 20, FR: 0, 80, 160 MG/KG.	EG&G Mason Research Institute.	MR: Clear evidence. Kidney (tubular cell adnoma or carcinoma). FR: No evidence.

Tentative order of review	Chemical/CAS No.	Study scientist/ technical report No.	Use	Exposure levels	Laboratory	Proposed levels of evidence of carcinogenicity [1]
3	Hydroquinone 123-31-9.	Dr. F. Kari, 919-541-2926 TR-366.	Photography processing, rubber antioxidant, intermediate for food antioxidants, depigmentor.	Oral, gavage (water): R: 0, 25, 50, M: 0, 50, 100 MG/KG.	American Biogenics Corp.	MR: Clear evidence. Kidney (tubular cell adenoma). FR: Some evidence. Hematopoietic system (leukemia). MM: No evidence. FM: Some evidence. Liver (adenoma or (carcinoma).
8	Iodinated glycerol 5634-39-9.	Dr. J. French, 919-541-7790 TR-340.	Expectorant, mucolytic.	Oral, gavage (water): FR&FM: 0, 62, 125, MR&MM: 0, 125,250 MG/KG.	EG&G Mason Research Institute.	MR: Some evidence. Hematopoietic System (Leukemia). Thyroid gland (follicular cell carcinoma). May have been related: nasal cavity (adenoma). FR: No evidence. MM: No evidence. FM: Some evidence pituitary gland (adenoma), Harderian gland (adenoma or carcinoma). May have been related: Forestomach (squamous cell papilloma).
1	N-Methylolacrylamide 924-42-5.	Dr. J. Bucher, 919-541-4532 TR-352.	Polymers for varnishes, adhesives, permanent press fabrics.	Oral gavage (water): R: 0,6,12, M: 0,25,50 M/KG.	Battelle Columbus Laboratory.	MR: No evidence. FR: No evidence. Clear evidence. Harderian Gland (adenoma). Liver (adenoma or carcinoma) Lung (alvelar/bronchiolar adenoma or A/B carcinoma). FM: Clear evidence. Harderian gland (Adenoma) liver (adenoma or carcinoma) lung (Alvelar/Bronchiolar Adenoma or A/B carcinoma) Ovary (granulosa cell tumor).
10	Pentaerythritol tetranitrate 78-11-5.	Dr. J. Bucher, 919-541-4532 TR-365.	Mainly in manufacture of detonating fuses; also as vasodilator.	Oral in feed: FR: 0, 6200, 12500, MR&M: 0, 25000, 50000 PPM.	EG&G Mason Research Institute.	MR: Equivocal evidence. Zymbal gland (adenoma or carcinoma). FR: Equivocal evidence. Zymbal gland (Adenoma or carcinoma) MM: No evidence. FM: No evidence.
9	Rhodamine 6G, 989-38-8.	DR. J. French 919-541-7790 TR-364.	Dye	Oral in feed: R: 0, 120, 250, FM: 0, 500, 1000, MM: 0, 1000, 2000 PPM.	Southern Research Institute.	MR: Equivocal evidence. Skin (keratoacanthoma) FR: Equivocal evidence adrenal gland (pheochromocytoma or malignant pheochromocytoma). MM: No evidence. FM: No evidence.

Note: The proposed results indicated are to be considered tentative until reviewed, discussed, and approved at the Board of Scientific Counselor's Peer Review Panel Public Meeting October 3–4, 1988.

Levels of Evidence Summary (38 individual experiments): clear evidence, 6; some evidence, 4; equivocal evidence, 12; no evidence, 15; inadequate experiment, 1.

[1] MR = male rats, FR = female rats, MM = male mice, FM = female mice.

[FR Doc. 88-19508 Filed 8-6-88; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Administration

[Docket No. N-88-1849]

Submission of Proposed Information Collections to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notices.

SUMMARY: The proposed information collection requirements described below have been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposals.

ADDRESS: Interested persons are invited to submit comments regarding these proposals. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposals for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notices list the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: August 23, 1988.

John T. Murphy,

Director, Information Policy and Management Division.

Proposal: Title I—Transfer of Note Report.

Office: Administration.

Description of the Need for the Information and its Proposed Use: Section 7(d) of the National Housing Act states that the insured shall not assign or otherwise transfer any loan reported for insurance to a transferee not holding a contract of insurance under Title I of the National Housing Act. This information is needed and used by HUD to transfer a loan from one insured lender to another.

Form Number: HUD-27030.

Respondents: Business or Other For-Profit.

Frequency of Submission: On Occasion.

Reporting Burden:

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Report	10,000		.20		.20		400

Total Estimated Burden Hours: 400.

Status: Extension.

Contact: Cynthia H. Palmer, HUD, (202) 755-5263, John Allison, OMB, (202) 395-6880.

Date: August 22, 1988.

Proposal: Application for Designation as Fee Personnel

Office: Housing.

Description of the Need for the Information and its Proposed Use: This form is used as an application for fee appraisers and reviewed by the HUD Field Offices who make determinations of acceptability based on the information provided. Qualified applicants are then placed on a roster from which assignments for fee work are made. This form is needed to select capable and responsible individuals to perform the appraisals.

Form Number: HUD-92563.

Respondents: Individuals or Households.

Frequency of Submission: On Occasion.

Reporting Burden:

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
HUD-92563	1,700		1		1/2		850

Total Estimated Burden Hours: 850.

Status: Extension.

Contact: Gerald A. White, HUD, (202) 755-7620, John Allison, OMB, (202) 395-6880.

Date: August 23, 1988.

Proposal: Recertification of Family Income and Composition

Office: Housing.

Description of the Need for the Information and its Proposed Use: Under the Section 235 Program, the forms are submitted by homeowners to mortgages to determine their continued eligibility for assistance and the amount of assistance to be received. The information is used by mortgages to report statistical and program data to HUD for monitoring purposes.

Form Number: HUD-93101 and 93101A.

Respondents: Individuals or Households and Businesses or Other For-Profit.

Frequency of Submission: On Occasion, Monthly, and Annually.

Reporting Burden:

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
HUD-93101	150,000		1.25		1		187,500
HUD-93101A	962		12		21		242,424

Total Estimated Burden Hours: 429,924

Status: Extension.

Contact: Florence B. Brooks, HUD, (202) 755–7330, John Allison, OMB, (202) 395–6880.

Date: August 22, 1988.

[FR Doc. 88–19580 Filed 8–26–88; 8:45 am]

BILLING CODE 4210–01–M

[Docket No. N–88–1850]

Submission of Proposed Information Collection to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755–6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Sec. 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; sec. 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: August 23, 1988.

David S. Cristy,

Deputy Director, Information Policy and Management Division.

Proposal: Request for Construction Change—Project Mortgages

Office: Housing

Description of the Need for the Information and its Proposed Use: This information is used by contractors, mortgagors, and mortgagees to obtain approval of changes in the contract drawings and specifications. It is needed by HUD to make sure they are complying with Article 1E of the Construction Contract.

Form Number: HUD–92437

Respondents: Businesses or Other For-Profit

Frequency of Submission: On Occasion

Reporting Burden:

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Request of Construction Change	500		20		3		30,000

Total Estimated Burden Hours: 30,000

Status: Extension.

Contact: Linda D. Cheatham, HUD, (202) 426–0035, John Allison, OMB, (202) 395–6880.

Date: August 23, 1988.

David S. Cristy,

Deputy Director, Information Policy and Management Division.

[FR Doc. 88–19579 Filed 8–26–88; 8:45 am]

BILLING CODE 4210–01–M

Office of the Regional Administrator—Regional Housing Commissioner

[Docket No. D–88–885]

Acting Manager, Region IV (Atlanta); Designation for Nashville Office

AGENCY: Department of Housing and Urban Development.

ACTION: Designation.

SUMMARY: Updates the designation of officals who may serve as Acting Manager for the Nashville Office.

EFFECTIVE DATE: July 12, 1988.

FOR FURTHER INFORMATION CONTACT: Henry E. Rollins, Director, Management Systems Division, Office of Administration, Atlanta Regional Office, Department of Housing and Urban Development, Room 634, Richard B. Russell Federal Building, 75 Spring Street, SW., Atlanta, Georgia 30303–3388, 404–331–5199.

Designation of Acting Manager for Nashville Office

Each of the officials appointed to the following positions is designated to serve as Acting Manager during the absence of, or vacancy in the position of, the Manager, with all the powers, functions, and duties redelegated or assigned to the Manager: Provided, That no official is authorized to serve as Acting Manager unless all other employees whose titles precede his/hers in this designation are unable to serve by reason of absence:

1. Director, Housing Division.
2. Director, Housing Management Division.
3. Chief Attorney.
4. Chief, Assisted Housing Management Branch.

This designation supersedes the designation effective February 25, 1987, (52 FR 17482, May 8, 1987).

(Delegation of Authority by the Secretary effective October 1, 1970 (36 FR 3389, February 23, 1971))

This designation shall be effective as of July 12, 1988.

Joseph P. Garaffa,

Acting Manager, Nashville Office.

Raymond A. Harris,

Regional Administrator, Regional Housing Commissioner, Office of the Regional Administrator.

[FR Doc. 88–19578 Filed 8–26–88; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV-010-08-4830-04]

Elko BLM District Grazing Advisory Board; Meeting

The Elko BLM District Grazing Advisory Board will hold a meeting September 29, 1988 at the Elko District BLM office at 10:00 a.m.

The Board will reveiw range improvement projects for Fiscal Year 1989 as proposed by the BLM, and proposed allotment management plans as well as other matters that may come before the Board.

The meeting is open to the public: Interested persons may make oral statements to the Board between 1:30 p.m. and 2:00 p.m. or file written statements for the Board's consideration. Anyone wishing to make an oral statement must notify the District Manager, BLM, 3900 E. Idaho St., Elko, NV 89801 by September 22, 1988. Depending on the number of persons wishing to make oral statements, a per person time limit may be established.

Rodney Harris,

District Manager.

[FR Doc. 88–19565 Filed 8–26–88; 8:45 am]

BILLING CODE 4310-HC-M

[ES-940-08-4520-13; ES-039041, Group 24]

Filing of Plat of the Survey of the Rend Lake Acquisition Boundary; Illinois

August 19, 1988.

1. The plat of the survey of the Rend Lake acquisition boundary, Township 6 South, Range 3 East, Third Principal Meridian, Illinois, will be officially filed in the Eastern States Office, Alexandria, Virginia at 7:30 a.m., on October 3, 1988.

2. The survey was made at the request of the Corps of Engineers.

3. All inquiries or protests concerning the technical aspects of the survey must be sent to the Deputy State Director for Cadastral Survey and Support Services, Eastern States Office, Bureau of Land Management, 350 South Pickett Street, Alexandria, Virginia 22304, prior to 7:30 a.m., October 3, 1988.

4. Copies of the plat will be made available upon request and prepayment of the reproduction fee of $4.00 per copy.

Lane J. Bouman,

Deputy State Director for Cadastral Survey and Support Services.

[FR Doc. 88–19501 Filed 8–26–88; 8:45 am]

BILLING CODE 4310-GJ-M

INTERSTATE COMMERCE COMMISSION

[Section 5a; Application No. 46]

Southern Motor Carriers Rate Conference, Inc., and Central and Southern Motor Freight Tariff Association, Inc.; Merger Agreement

AGENCY: Interstate Commerce Commission.

ACTION: Notice of filing of joint application for merger, and for comments.

SUMMARY: Southern Motor Carriers Rate Conference, Inc. (SMC) and Central and Southern Motor Freight Tariff Association, Inc. (CSA) have filed a joint application seeking approval of the merger of CSA into SMC, and approval of the revised by-laws of SMC. SMC and CSA are collective ratemaking organizations which presently have overlapping territories and memberships. With one minor exception (the points of Helena and West Helena, AR), the territorial scope of SMC embraces that of CSA. SMC's activities are confined to traffic moving between, and from and to, points in Alabama, Florida, Georgia, Kentucky, Louisiana (eastern portion), Mississippi, North Carolina, South Carolina, Tennessee, Virginia (southern portion), and a small part of West Virginia. However, to date SMC has not engaged in collective ratemaking to the full extent of its territory and its present activities do not include CSA's territory. CSA's present activities are confined to traffic between points in the South, on the one hand, and on the other, points in Illinois, Indiana, Michigan, Missouri, Ohio, Pennsylvania, West Virginia, and Wisconsin. The merger would broaden SMC's present collective ratemaking activities to include all of its authorized territorial scope and add the two points in Arkansas previously mentioned. SMC has 232 members. Only 45 of CSA's 160 members do not belong to SMC. Applicants believe that significant economies of operation will result from the merger. Employment costs would be reduced and combined operations would lower administrative and facilities costs. The merged operation would be conducted under the terms of SMC's agreement (with minor amendments) that received final approval as consistent with the requirements of 49 U.S.C. 10706(b).

DATES: Persons interested in participating in this proceeding should so advise the Commission in writing by September 28, 1988. A service list will then be prepared. Applicants will have 10 days from the service date of that list to serve each party on the list and the Commission with a copy of the application and any additional evidence. (If the Commission or a party has been previously supplied the materials, applicants need only so certify.) Other parties will have 35 days from the service date of the service list to submit their comments to the Commission and to applicants' representatives. Applicants will have 50 days from the service date of the list to reply.

ADDRESS: An original and 10 copies, if possible, of comments referring to Section 5a Application No. 46 should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423. A copy of any comments filed with the Commission must also be served on applicants' representatives.

FOR FURTHER INFORMATION CONTACT: J.R. Hodge (202) 275–7890 or Richard B. Felder (202) 275–7691 [TDD for hearing impaired: (202) 275–1721].

SUPPLEMENTARY INFORMATION: The Commission seeks comment from interested parties on any and all aspects of this proposal, including anticipated competitive impacts of it.

Applicants are encouraged to submit detailed evidence supporting their anticipated operating savings and explaining how the merger would affect collective activity generally.

No Commission decision accompanies this notice. Copies of the merger agreement are available for public inspection and copying at the Office of the Secretary, Interstate Commerce Commission, Washington, DC 20423, and from the applicant's representatives: John Womack, P.O. Box 37110, Louisville, KY 40233–7110, Sherman D. Schwartzberg, 1307 Peachtree Street, NE., Atlanta, GA 30309, and John W. McFadden, Jr., 1600 Wilson Boulevard, Suite 1001, Arlington, VA 22209.

Authority: 49 U.S.C. 10321 and 10706 and 5 U.S.C. 553.

Decided: August 22, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Sterrett did not participate in the disposition of this proceeding.

Noreta R. McGee,

Secretary.

[FR Doc. 88–19523 Filed 8–26–88; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-305X]

Nicholas, Fayette & Greenbrier Railroad Co., Abandonment Exemption, Fayette County, WV

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 13.4-mile line of railroad between milepost 0.0 at Babcock, WV, and milepost 13.4 at the end of applicant's Landisburg Subdivision near Landisburg, WV, in Fayette County, WV.

Applicant has certified that (1) no local or overhead traffic has moved over the line for at least 2 years and (2) no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the amendment shall be protected pursuant to *Oregon Short Line R. Co.-Abandonment-Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective September 28, 1988 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve environmental issues [1] and formal expressions of itent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) [2] must be filed by September 5, 1988 and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by September 13, 1988 with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Patricia Vail, 500 Water Street, Jacksonville, FL 32202

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will serve the EA on all parties by August 29, 1988. Other interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275–7316.

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: August 15, 1988.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 88–19524 Filed 8–26–88; 8:45 am]

BILLING CODE 7035-01-M

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[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines,* 4 I.C.C. 2d 400 (1988).

[2] *See Exemp. of Rail Line Aband. or Discont.—Offers of Fin. Assist.,* 4 I.C.C. 2d 164 (1987), and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440–48446).

DEPARTMENT OF JUSTICE

Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Justice

AGENCY: Department of Justice.

ACTION: Notice of availability of draft Transition Plan and Self-Evaluation and request for comments.

SUMMARY: The Department of Justice is announcing the availability of its draft Transition Plan and Self-Evaluation for implementation of its regulation prohibiting discrimination on the basis of handicap in its federally conducted programs and activities (28 CFR Part 39). The draft describes the Department's review of its policies, practices, and facilities and their effects on individuals with handicaps involved in Department of Justice programs and activities, and the steps the Department has taken or is taking to ensure that no qualified individual with handicaps is excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any such program or activity. The purpose of this notice is to provide an opportunity for interested persons, including individuals with handicaps, and organizations representing individuals with handicaps, to participate in the self-evaluation process and the development of the transition plan by reviewing the Department's draft Transition Plan and Self-Evaluation and submitting oral and written comments.

DATE: To be assured of consideration, comments must be received on or before October 28, 1988.

ADDRESSES: Comments should be sent to the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, DC 20035–6118. The draft Transition Plan and Self-Evaluation is available for public inspection at the Coordination and Review Section, Civil Rights Division, Department of Justice, 320 First Street, NW., Room 854, Washington, DC 20530. Persons who need assistance to review the document will be provided with appropriate aids such as readers, print magnifiers, or audio tape players. A limited number of copies of the document are available. The document is available in regular and large print, on computer disc, and on audio tape. Copies may be obtained from the Coordination and Review Section.

FOR FURTHER INFORMATION CONTACT: Bert Keys, Coordination and Review Section, (202) 724–2218 (Voice) or (202)

724–7678 (TDD). (These are not toll free numbers.)

SUPPLEMENTARY INFORMATION: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in federally assisted programs and activities, was amended in 1978 to extend its coverage to programs and activities conducted by Federal Executive agencies, including the Department of Justice. The Department's regulation implementing section 504 for its federally conducted program is codified at 28 CFR Part 39. Section 39.110 of that rule requires the Department to evaluate its current policies and practices for compliance with section 504. Additionally, section 39.150 prescribes that, in the event that structural changes are necessary to make the Department's programs accessible to individuals with handicaps, the Department shall develop a plan setting forth the steps necessary to complete these changes. The Department has combined the self-evaluation process with the development of a transition plan. This document is the result of an examination of the Department's facilities and the policies and practices by which the Department's programs are operated. Various components of the Department have identified those obstacles that might hinder the effective participation of individuals with handicaps in the Department's programs and have either begun or already completed the process by which these potential obstacles are to be eliminated. The draft Transition Plan and Self-Evaluation thus sets forth the results of this examination and outlines the actions that the Department has taken and intends to take over the next several years.

The Department actively solicits specific, concrete public comment to help resolve issues that have been noted or to identify new issues. In particular, the public is invited to comment on how the Department can best ensure access to its programs by using telecommunication devices for deaf persons (TDD's). Also, because of the very large number of facilities (over 1,500) used by the Department throughout the United States, including its territories and possessions, the Department seeks any specific information the public may have regarding accessibility in facilities used by the Department. This information will help the Department in taking the necessary steps to improve accessibility.

Although the Department's employment program is subject to section 504 under § 39.140 of the final rule, the Department has not included employment practices as part of the self-evaluation process. The Department is subject to the requirements and procedures of section 501 of the Rehabilitation Act of 1973, as amended. Section 501 requires the Department to take affirmative action to hire and advance in employment qualified individuals with handicaps. The Equal Employment Opportunity Commission (EEOC) has established detailed regulations to implement section 501 at 29 CFR Part 1613. The EEOC's section 501 at 29 CFR Part 1613. The EEOC's section 501 program includes affirmative action requirements that go beyond the nondiscrimination requirements of section 504. The Department believes that further review of its employment practices in this document is unnecessary in light of its compliance with its section 501 responsibilities.

The draft Transition Plan and Self-Evaluation reflects the Department's internal organizational structure. Although it is generally true that the Justice Management Division (JMD) provides administrative and management support services to all of the Department's component agencies, the largest of the Department's components, (*i.e.*, Bureau of Prisons, Marshals Service, Immigration and Naturalization Service, Drug Enforcement Administration, and Federal Bureau of Investigation) have their own management staff and function independently of JMD. These components will directly implement their respective portions of the transition plan. The smaller components within the Department do not have their own management staff. Thus, they conducted their self-evaluations with assistance from the Civil Rights Division and will implement their respective portions of the transition plan in conjunction with JMD. The components covered by this document include:

- The Federal Bureau of Prisons has almost 12,000 employees, a budget of 650 million dollars and maintains 47 Federal correctional institutions with over 40,000 inmates;
- The United States Marshals Service, consisting of 94 marshals with a support staff of 2,700, provides security assistance for Federal prisoners and interacts with the public in matters related to the judicial process;
- The Immigration and Naturalization Service has approximately 12,000 employees, a budget of about 600 million dollars, and maintains a broad network of regional and district offices to enforce the immigration laws;
- The Executive Office for Immigration Review, which is entirely separate from the INS, includes the Board of Immigration Appeals, the Office of the Chief Immigration Judge, and 250 support staff;
- The Drug Enforcement Administration, which enforces the controlled substances laws in coordination with Federal, State, and local law enforcement authorities, has almost 5,000 employees and field offices in 15 states and the District of Columbia;
- The Federal Bureau of Investigation has almost 23,000 employees, a budget of 1.5 billion dollars, and maintains 59 field divisions and over 400 auxiliary offices throughout the United States;
- The Justice Management Division oversees selected management operations and provides direct administrative services to the offices, boards, and divisions of the Department;
- The U.S. Parole Commission's 168 employees administer a parole system for Federal prisoners and develop Federal parole policy;
- The Office of the Pardon Attorney (OPA), in consultation with the Associate Attorney General, receives and reviews all petitions for Executive clemency, initiates the necessary investigations and prepares the recommendation of the Associate Attorney General to the President in connection with consideration of all forms of Executive clemency. OPA has ten employees;
- The Executive Office for U.S. Attorneys (EOUSA) provides general executive assistance and supervision to the 94 offices of the U.S. Attorneys which have 5,000 employees in over 150 offices throughout the United States. EOUSA also coordinates the relationship of other Department units with those offices;
- The Executive Office for U.S. Trustees supervises the administration of all cases filed pursuant to the Bankruptcy Reform Act of 1978 with the offices of the United States Trustees. There are 88 offices of United States Trustees Executive Office and the Offices of the U.S. Trustees have a combined staff of almost 400 persons.
- The Office of Justice Programs provides financial and technical assistance to State and local governments and nongovernmental organizations for criminal justice system improvement programs;
- The Community Relations Service consists of ten regional offices throughout the United States that provide conciliation and mediation services to communities where disputes

regarding discriminatory practices have arisen;

- The six legal divisions (Antitrust, Civil, Civil Rights, Criminal, Land and Natural Resources and Tax) have over 3,600 employees in Washington and in several field offices. These divisions conduct litigation on a wide variety of issues where the interests of the Federal Government are involved;
- The Foreign Claims Settlement Commission's employees determine claims of United States nationals for loss of property in specific foreign countries as a result of the nationalization or other taking of property by those governments;
- INTERPOL—United States National Central Bureau functions as a central conduit providing communication between this country, other INTERPOL member countries, and the INTERPOL Headquarters;
- A variety of Executive level offices (Offices of the Attorney General, Office of the Deputy Attorney General, Office of the Associate Attorney General, Office of the Solicitor General, Office of Legal Counsel, Office of Legal Policy, Office of Intelligence Policy and Review, Office of Professional Responsibility, Office of Legislative and Intergovernmental Affairs, and the Office of Public Affairs) provide direct support to the top management officials of the Department.

Wm. Bradford Reynolds,

Assistant Attorney General, Civil Rights Division.

[FR Doc. 88-19499 Filed 8-26-88; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree

In accordance with the policy of the Department of Justice, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *Unites States v. Hillsborough County, Florida and the State of Florida*, has been lodged with the United States District Court for the Middle District of Florida. That action was brought pursuant to the Clean Water Act for violations of the discharge limitations included in the federal permit issued to Hillsborough County for its Dale Mabry wastewater treatment plant, and for unpermitted discharges related to the plant.

The settlement agreement requires Hillsborough County to submit plans for improvements to the plant to insure that effluent discharges do not occur at locations or in frequencies in violation of its NPDES permit and to construct those necessary improvements by April 15, 1989. Hillsborough County must be in full compliance with its permit by April 30, 1989. Until that time, Hillsborough County must meet strict interim standards regulating its discharge or pay stipulated penalties for such violations. In addition, Hillsborough County will pay a $195,000 civil penalty to the United States.

The Department of Justice will receive comments relating to the proposed consent decree for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC 20530. All comments should refer to *United States v. Hillsborough County, Florida*, D.J. Ref. 90-5-1-1-3024.

The proposed consent decree may be examined at the office of the United States Attorney, Robert Timberlake Building, 500 Zack Street, Tampa, Florida 33602 and at the Region IV Office of the U.S. Environmental Protection Agency, 345 Courtland Street, NE., Atlanta, Georgia 30365. Copies of the proposed consent decree may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, Room 1527, Tenth Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed consent decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. Any request for a copy of the consent decree should be accompanied by a check in the amount of $1.70 for copying costs ($0.10 per page) payable to "United States Treasurer."

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-19497 Filed 8-26-88; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree; McGraw-Edison Co. et al.

In accordance with the policy of the Department of Justice, 28 CFR 50.7, notice is hereby given that on August 15, 1988 a proposed partial consent decree in *United States v. McGraw-Edison Co., et al.*, Civ. No. 88-542 C, was lodged with the United States District Court for the Western District of New York. That action was brought pursuant to the Comprehensive Environmental Response, Compensation and Recovery Act for the recovery of costs expended by the United States in connection with the Olean Well Field Site located in Olean, New York and for penalties against a non-settling party.

The partial consent decree is entered into between the United States, and five of the six parties potentially responsible for the contamination at the Olean Well Field Site. The decree provides for the payment by those parties of $1,026,696.50 to the United States for costs expended by the government in conducting investigatory, removal and remedial activities at the site. The partial consent decree does not resolve the liability of one of the defendants named in the complaint filed by the United States in this action.

The Department of Justice will receive comments relating to the proposed consent decree for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC. All comments should refer to *United States v. McGraw-Edison Co., et al.*, D.O.J. Ref. 90-11-3-181.

The proposed consent decree may be examined at the office of the United States Attorney, 502 U.S. Courthouse, Court & Franklin Streets, Buffalo, New York 14202 and at the Region II Office of the Environmental Protection Agency, 26 Federal Plaza, New York, New York 10278. Copies of the proposed partial consent decree may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, Room 1515, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. Any request for a copy of the decree should be accompanied by a check in the amount of $1.50 for copying costs payable to the "United States Treasurer."

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-19498 Filed 8-26-88; 8:45 am]

BILLING CODE 4410-01-M

Consent Decree in Clean Air Act Enforcement Action; Simplicity Manufacturing, Inc.

In accordance with the Department Policy 28 CFR § 50.7, notice is hereby given that on August 15, 1988 a Consent Decree in *United States V. Simplicity Manufacturing, Inc.*, Civil Action No. 88-C-0294 was lodged with the United States District Court for the Eastern District of Wisconsin. The Compliant alleged Simplicity used coatings which violated limits established by the Clean Air Act and the Wisconsin State Implementation Plan (SIP)for volatile organic compounds at Simplicity's Port Washington, Wisconsin facility. Under the decree, Simplicity has agreed not to use coatings which violate the Wisconsin SIP, to satisfy various monitoring, record keeping and reporting requirements, and to pay a civil penalty of $35,000.

The Department of Justice will receive for thirty (30) days from the publication date on this notice written comments relating to the decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and refer to *United States v. Simplicity Manufacturing, Inc.*, 90-5-2-11220.

The proposed consent decree can be examined at the office of the United States Attorney, 330 Federal Building, 517 E. Wisconsin Avenue, Milwaukee, Wisconsin, and at the Region V Office of the Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois. Copies of the consent decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1521, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. In requesting a copy, please enclose a check in the amount of $1.20 (10 cents per page reproduction cost) payable to the Treasurer of the United States. The Decree can be examined at the above address without cost.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-19500 Filed 8-26-88; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

National Advisory Committee on Occupational Safety and Health; Request for Nomination of Members

The Assistant Secretary of Labor for Occupational Safety and Health requests nominations for memership on the National Advisory Committee on Occupational Safety and Health. The Committee was established under section 7(a) of the Occupational Safety and Health Act of 1970 to advise the Secretary of Labor and the Secretary of Health and Human Services on matters relating to the administration of the Act.

The terms of 6 members of the 12 member committee will expire on November 13, 1988. Nominations will be accepted for vacancies occurring in the following categories Three public representatives, one management representative, one labor representative, and one safety representative. Any interested person or organization may nominate one or more qualified persons for membership. Nominees should be identified by name, occupation or position, address, and telephone number and social security number. The category which the candidate would represent should be specified and a resume of the nominee's background, experience, and qualifications included. In addition, the nomination should state that the nominee is aware of the nomination and is willing to serve as a committee member for a 2 year term ending November 13, 1990.

Nominations should be submitted to Tom Hall, Division of Consumer Affairs, Occupational Safety and Health Administration, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, no later than September 15, 1988. Nominations received after this date cannot be considered.

Signed at Washington, DC, this 23rd day of August 1988.

John A. Pendergrass,

Assistant Secretary.

[FR Doc. 88-19529 Filed 8-26-88; 8:45 am]

BILLING CODE 4510-26-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-364]

Alabama Power Co., Joseph M. Farley Nuclear Plant, Unit 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from a portion of the requirements of 10 CFR 50-55a(g)(4)(ii) to the Alabama Power Company (the licensee) for the Joseph M. Farley Nuclear Power Plant, Unit 2 (Farley 2 or Unit 2) located in Houston County, Alabama.

Environmental Assessment

Identification of Proposed Action

The proposed action would grant an exemption from the requirement of 10 CFR 50.55a(g)(4)(ii) to authorize a program update at this time to the ASME Code, 1983 Edition, through the Summer 1983 addenda, for the Farley 2 Inservice Inspection (ISI) program and the Farley 2 Inservice Testing (IST) program. Thereby, the ASME Code of record for Farley 2 would be updated three years in advance of the July 31, 1991, Code requirements. Also, the updated Farley 2 program would continue through the first and second 40-month periods of the second ten-year interval until December 1, 1997. This action would allow the licensee to maintain and exercise one set of ISI and IST program requirements for both Unit 1 and Unit 2. The licensee intends to update the programs to be performed starting in 1997 in order that Code requirements for the remaining life of the plant remain the same for both units.

The Need for the Proposed Action

The licensee has described the need for the action as follows:

> The requested exemption is needed because the ISI and IST Programs for Farley Nuclear Plant would otherwise be accomplished under two different editions of the ASME Code. Although administratively possible, this situation could contribute to the increased administrative overhead in the performance of inspection and testing requirements to two different editions of the Code. This would create an additional administrative workload for what could be described as only nominal technical differences in the inspection and testing requirements.

The Commission agrees with this assessment.

Environmental Impact of Proposed Action

The licensee has reviewed the environmental impact of the proposed action as follows:

> The proposed exemption would provide a degree of inservice inspection and testing that is equivalent to that required by 10 CFR 50.55a(g)(4), such that there would be no increase in the risk of failure for operation readiness of pumps and valves or other components whose function is required for safety at these facilities. Consequently, the probability of failure for operational readiness of components would not be increased, the radiological risk would not be greater than determined previously, and the requested exemption would not otherwise affect plant radiological effluents. Therefore, we concluded that there are no significant radiological environmental impacts associated with this proposed exemption.
>
> With regard to potential nonradiological impacts, the proposed exemption involves features located entirely within the restricted area as defined in 10 CFR Part 20. It would not affect plant nonradiological effluents and would have no other environmental impact. Therefore, we conclude that there are no significant nonradiological environmental

impacts associated with the proposed exemption.

The Commission agrees with this assessment. There would be no significant increase in the allowable individual or cumulative occupational radiation exposure. Therefore, the Commission concludes that there are no significant radiological and nonradiological environmental impacts associated with the proposed amendment.

Alternative to the Proposed Action

Because the Commission has concluded that there is no significant environmental impact associated with the proposed exemption, any alternative to this exemption will have either no significantly different environmental impact or greater environmental impact.

The principal alternative would be to deny the requested exemption. This would not reduce environmental impacts as a result of plant operations.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in connection with the "Final Environmental Statement related to the operation of the Joseph M. Farley Nuclear Plant, Units 1 and 2," dated December 1974.

Agencies and Persons Consulted

The NRC staff has reviewed the licensee's request that supports the proposed exemption. The NRC staff did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the request for the exemption dated June 22, 1988, which is available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC, and at the George S. Houston Memorial Library, 212 W. Burdeshaw Street, Dothan, Alabama 36303.

Dated at Rockville, Maryland this 18th day of August 1988.

For the Nuclear Regulatory Commission.

Lester L. Kintner,

Acting Director, Project Directorate II-1, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88-19548 Filed 8-26-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-482]

Wolf Creek Nuclear Operating Corp., Wolf Creek Generating Station; Issuance of Director's Decision Under 10 CFR 2.206 (DD-88-14)

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has denied a petition under 10 CFR 2.206 filed Ms. Billie Pirner Garde on behalf of the Nuclear Awareness Network (NAN) (hereinafter referred to as the Petitioners). The Petitioners asked the U.S. Nuclear Regulatory Commission (NRC) to:

1. Require the Staff to take possession of the Quality First (Q1) files and provide to the Commission and the public the analysis of why the alleged significant safety-related deficiencies identified for the past year by members of the work force do not pose a danger to the public health and safety.
2. Conduct an inquiry on the ramifications of the collective safety significance and/or adequacy on the quality assurance (QA) program in the light of the information contained in the Q1 files.
3. Require an explanation from both the Office of Nuclear Reactor Regulation (NRR) and Region IV as to why they allegedly allowed the allegations to be exempt from the regulatory analysis for determination of safety significance.
4. Request that the Office of Investigations (OI) conduct an investigation into the alleged compromising of the Q1 program by William Rudolph, site QA manager. Mr. Rudolph was originally responsible for resolvling allegations made against the QA program that he supervised.

The Petitioner's request has been denied for the reasons fully described in the Director's Decision (DD-88-14) under 10 CFR 2.206, issued on this date, which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC 20555, and the Local Public Document Rooms for the Wolf Creek Generating Station located at Emporia State Unviersity, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801, and Washburn University School of Law Library, Topeka, Kansas.

A copy of the decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206(c). As provided in this regulation, the decision will constitute the final action of the Commission twenty-five (25) days after issuance, unless the Commission, on its own motion, institutes review of the decision within that period.

Dated at Rockville, Maryland, this 22nd day of August 1988.

For the Nuclear Regulatory Commission.

Thomas E. Murley,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 88-19549 Filed 8-26-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-261; Licensee No. DPR-23, EA 87-124]

Carolina Power and Light Co., H.B. Robinson Steam Electric, Generating Plant Unit 2; Order Imposing Civil Monetary Penalty

I

Carolina Power and Light Company (CP&L/licensee) is the holder of Operating License No. DPR-23 (license) issued by the Nuclear Regulatory Commission (NRC/Commission) on July 31, 1970. The license authorizes the licensee to operate the H.B. Robinson Steam Electric Generating Plant, Unit 2, in accordance with the conditions specified therein.

II

A Safety System Functional Inspection (SSFI) was conducted on March 9—April 15, 1987, with a followup inspection conducted May 26—29, 1987, at the H.B. Robinson Steam Electric Generating Plant, Hartsville, South Carolina. The results of this inspection indicated that the licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the licensee by letter dated November 13, 1987. The Notice states the nature of the violations, the provisions of the NRC's requirements that the licensee had violated, and the amount of the civil penalty proposed for Violation I set out in the Notice. The licensee responded to the Notice by letter dated December 17, 1987.

III

After consideration of the licensee's response and the statements of fact, explanations, and arguments for withdrawal of Violation I, reduction of severity level, and remission or mitigation of the proposed civil penalty contained therein, the Deputy Executive Director for Regional Operations had determined, as set forth in the Appendix to this Order, that Violation I occurred as stated in the Notice and that the penalty proposed for Violation I designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (Act), U.S.C. 2282, and 10 CFR 2.205, it is hereby credited that:

The licensee pay a civil penalty in the amount of Fifty Thousand Dollars ($50,000) within 30 days of the date of this Order, by check, draft, or money order, payable to the Treasurer of the United States and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555.

V

The licensee may request a hearing within 30 days of the date of this Order. A request for a hearing shall be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555, with copies to the Assistant General for Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Regional Administrator, Region II, 101 Marietta Street, NW., Atlanta, Georgia 30323, and a copy to the NRC Resident Inspector, H. B. Robinson Steam Electric Generating Plant.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the licensee fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the licensee requests a hearing as provided above, the issue to be considered at such hearing shall be:

(a) Whether the licensee was in violation of the Commission's requirements as set forth in Violation I of the Notice referenced in Section II above, and

(b) Whether, on the basis of such violation, this Order should be sustained.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland this 17th day of August 1988.

James M. Taylor,

Deputy Executive Director for Regional Operations.

Appendix—Evaluation and Conclusions

On November 13, 1987, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during a Safety System Functional Inspection (SSFI) conducted March 9—April 15, 1987, with a followup inspection conducted May 26–29, 1987. Carolina Power and Light Company (CP&L/licensee) responded to the Notice on December 17, 1987. In its response, the licensee denied the violations as stated in the Notice, adding that in no instance does the Notice raise any issues that individually or collectively could have jeopardized the capability of its operating staff to safely shut the plant down using established procedures. The licensee asserts its belief that if complied with the requirements of 10 CFR Part 50, Appendix R, although "some problems may have existed at the time of the SSFI," and that, if the NRC concludes that violations occurred, they merit no more than a Severity Level IV classification. This appendix addresses each of the detailed arguments raised by the licensee related to the Notice.

The intent of Appendix R was to prevent a repeat of the TVA Browns Ferry fire and to provide adequate separation of equipment and power supplies necessary to achieve safe shutdown. For plants where extensive modifications would be required to meet the separation criteria, Appendix R allowed the substitution of Dedicated/Alternate Shutdown. These methods permit the use of dedicated equipment and manual operator actions to:

1. Achieve and maintain subcritical conditions in the reactor,
2. Maintain reactor coolant inventory,
3. Achieve and maintain hot standby,
4. Achieve cold shutdown within 72 hours, and
5. Maintain cold shutdown.

A Dedicated/Alternate Shutdown system was implemented at H. B. Robinson Steam Electric Generating Plant rather than the installation of extensive plant modifications. The licensee proposed to meet Appendix R by establishing adequate procedures, training, communications, and emergency lighting to assure safe shutdown capability with a fire in any zone. The licensee also stated that at least ten operators would be called in to direct the activities of maintenance personnel throgh the dedicated shutdown repair procedures.

After the initial development of the dedicated shutdown procedures and initial operator training by a consultant, the primary responsibility for Dedicated/Alternate Shutdown was relegated to the Operations Department. Interviews with Operations management and staff indicated that the licensee believe the chance of a severe fire and implementation of the dedicated shutdown procedures were extremely remote. Operations staff indicated that dedicated shutdown was considered a very low priority in comparison with other operations responsibilities and requirements.

VIOLATION I

I. Response to Violation I

Restatement of Violation I (Civil Penalty)

10 CFR 50.48 requires, in part, that the licensee implement fire protection features to assure fire protection of safe shutdown capability in accordance with Section III.G of 10 CFR Part 50, Appendix R. The licensee elected to install a dedicated shutdown capability pursuant to Section III.G of Appendix R and was required to do so by March 24, 1986. Section III.L.3 of Appendix R requires the licensee to have procedures in effect to implement this shutdown capability.

Technical Specification 6.5.1.1.1.f requires that written procedures shall be established, implemented, and maintained for the Fire Protection Program.

Contrary to the above, the licensee failed to adequately establish, implement and maintain procedures to carry out the dedicated shutdown capability in the event of a fire in the control room. Specific example of these failures include the following:

A. *Failure to Establish Procedures.* 1. On March 24, 1987, plant operating procedures were not adequately established in that the procedure entry conditions were insufficient to ensure that Dedicated Shutdown Procedure (DSP)–001, Hot Shutdown Using the Dedicated/Alternate Shutdown System, was entered only when required. In particular, the lack of decision points may not preclude unwarranted deenergization of all AC power sources.

Summary of Licensee's Response. The licensee denies the alleged violation occurred. The licensee believes that DSP–001 did provide adequate guidance on the entry conditions in that the procedures stated "This procedure is used to safely bring the reactor plant to a hot shutdown condition subsequent to a severe fire. The procedure will only be used if the extent of the fire induced damage precludes the use of the Emergency Operating Procedures (EOPs) Network to safely control the plant."

The licensee states that the NRC had previously approved deenergization of major busses in the August 8, 1984 Safety Evaluation Report (SER). This action was approved as a basis to prevent spurious operations from impacting safe shutdown and from causing damage to other plant equipment. Additionally, the licensee stated that spurious operation of the emergency diesel generators and equipment running without loss of offsite power was identified in a 10 CFR Part 50, Appendix R, inspection conducted by Region II personnel in 1985. The Inspector Followup Items, detailed in NRC inspection report 85–07, identified two concerns. They were the spurious operation of the emergency diesel generators and equipment running without loss of off-site power. The licensee states that it resolved these concerns by determining that all AC power sources except for the Dedicated Shutdown (DS) diesel would be deenergized initially and that restoration occur as soon as possible following stabilization of the plant in a hot shutdown condition and determination as to the extent of fire damage and completion of any needed repairs. The licensee asserts that the NRC staff previously accepted this methodology, which is now found to be deficient, and as such may constitute a backfit.

The licensee states that the dedicated shutdown procedures were developed using worst case fire conditions that could not be controlled using the emergency operating procedures. An event of this magnitude does not afford one time to diagnose equipment malfunctions during initial stages when outside the emergency operating procedure network or from remote operating stations.

With the above statement in mind, the licensee states they were in compliance with the requirements of 10 CFR Part 50, Appendix R, and denies that any violation of regulations occurred.

NRC Evaluation. The licensee's emergency operating procedures (EOPs) are not designed for use outside of the main control room. At the time of the SSFI inspection, the licensee had in place two separate procedures designed to allow the safe shutdown of the reactor from outside the main control room. Abnormal Operating Procedure (AOP) –004, Control Room Inaccessibility, which was in place prior to the dedicated shutdown procedures, was intended to allow for a controlled boration shutdown when the control room is inaccessible due to smoke or toxic gas. The other procedure, DSP–001, Hot Shutdown Using the Dedicated/Alternate Shutdown System, was intended to allow a safe shutdown from outside the control room when severe fire conditions have resulted in a loss of power to both trains of the normal systems and instrumentation used to perform a reactor shutdown, or when the fire results in the unintended and uncontrolled spurious operation of systems and equipment. DSP–001 is the more severe of the two procedures in that it requires the intentional deenergization of all normal and emergency onsite and offsite power supplies. Additionally, once DSP–001 was entered, there are no additional decision points or related symptoms provided prior to the deenergization of the AC power to the redundant trains of the normal safety shutdown systems and instruments.

During the inspection, the inspectors interviewed operations personnel during a simulated walkthrough and posed the hypothetical situation that there was a very smoky fire in the main control panel (current transformer fire). The Operations supervisor in setting up the walkthroughs expected under the simulated conditions (no loss of voltage or ESF equipment, or spurious equipment actuations) that the Senior Reactor Operator (SRO) would elect to enter AOP–004 and perform a routine shutdown from outside the main control room. However, in the walkthrough the SRO elected first to have the operators don respirators and attempt the shutdown using the EOPs from within the main control room which was supposedly on fire. Given a simulated increase in heat level and smoke, the SRO then decided to enter DSP–001, not the expected response. This highlights inadequacies in the licensee's procedures and training with regard to the use of the Dedicated Shutdown and Abnormal Operating Procedures.

DSP–001 is considered inadequate as it permits entry into the procedure and resulting deenergization without adequate consideration of the circumstances associated with the fire event. In particular, it fails to interface with AOP–004 with the resulting uncertainty as to which procedure is to be applied.

The NRC staff agrees that approval of the deenergization of AC power sources in the alternative/dedicated shutdown procedures was given in the SER and in inspection reports. The NRC in the SER noted the multiple and complex manual actions required by this approach and noted that compliance with Appendix R Would be subject to future inspections. Deenergization of AC power sources is an appropriate response to a worst case fire at the Robinson facility. In the case of a less severe fire, a situation not before evaluated by the NRC staff at the Robinson facility and for which deenergization of AC power sources had not been specifically approved, the NRC staff expects that appropriate procedures including guidance for these less severe fires would be provided to preclude the Unwarranted deenergization of the AC power sources. In this case, the procedures were insufficient to provide the necessary guidance. In addition, operator training was proven not to be sufficient to ensure a consistent response.

NRC Conclusion. The safety significant concern is that the lack of well-defined entry conditions and interfaces among EOP's, AOP's, and DSP's. This violation when combined with inadequate operator training and the associated stresses under actual fire situations, could result in confusion of the operators and the unwarranted initiation of DSP–001 and subsequent deenergization of the normal emergency power sources. For the above reasons, the NRC staff concludes that this example of the violation occurred as stated.

2. On March 24, 1987, the dedicated shutdown procedures did not provide directions for controlling the auxiliary feedwater AFW) pump speed controller.

Summary of Licensee's Response. The licensee indicated that Operations personnel perform, on a monthly basis, Operations Surveillance Test (OST)–202 Steam Driven Auxiliary Feedwater System Component Test. This procedure requires operators to use the knurled knob on the Steam Driven AFW pump speed controller. The licensee considers the inclusion of specific instruction as to which direction to turn the knurled knob as unnecessary, claiming it is well within the scope of operators' knowledge. Additionally, the licensee states that steam generator level can be controlled solely by the use of the pump discharge valve. As such they have deleted the requirement to adjust the pump speed controller from the emergency operating procedures but the dedicated shutdown procedures had not yet been revised.

NRC Evaluation. DSP–001, Step 5.1.3. requires operators to control the steam driven AFW pump by:

(1) Controlling steam generator level by throttling valve V2–14[illegible] and

(2) Adjusting AFW pump speed using the knurled knob.

While operation of the knurled knob may be within an operator's knowledge, NRC discussions with operators during walkthroughs of DSP–001 indicated confusion over the use of this knob to control pump speed and how adjustments of this knob would interface with the efforts to control steam generator level through valve adjustments. In addition, this step is in conflict with the system description provided by the licensee which indicates that adjustment of this knob without first removing control air supply could result in physical damage to the controller.

The licensee's response indicates that this step had been removed from the emergency operating procedures but the dedicated shutdown procedures had not yet been revised. In actuality, this unnecessary and inadequate step had been removed from the emergency operating procedures in November 1984. This revision to the emergency operating procedures therefore took place several months before the dedicated shutdown procedures were even written, and the licensee's implication that the associated revision of the dedicated shutdown procedures was pending is inappropriate. It is clear that the dedicated shutdown procedures did not have the same management attention as the emergency operating procedures.

Further, if, as the licensee asserts, its operators knew how to operate the AFW pump properly, review or walkthroughs of the dedicated shutdown procedures should have alerted plant personnel to the fact that procedural inconsistencies existed. This is another indication of the lack of plant staff and management involvement in these procedures.

NRC Conclusion. The instructions contained in DSP-001 did not provide for adequate guidance for controlling the AFW pump speed controllers as evidenced by the confusion experienced during the NRC inspection.

For the above reasons, the NRC staff concludes this example of the violation occurred as stated.

3. On March 24, 1987, DSP-011 contained an incorrect cable routing diagram for the repair of the PORV control power.

Summary of Licensee's Response. The licensee does not argue the accuracy of the statement, but does deny that any violation of a regulatory requirement occurred. The licensee indicated that it recognized the need for a revised diagram as a result of a change to the doorway into the auxiliary building prior to the SSFI inspection. The licensee states that the walls did have penetrations through which the cables could be run. Additionally, the licensee states that measures were in progress to revise the procedure to include an updated drawing depicting the corrected cable routing.

NRC Evaluation. The licensee's response indicated that it was aware of the need to revise the cable routing diagram due to construction changes to the walls of the auxiliary building. Operators did have a draft revision of the revised diagram at the time of the SSFI inspection. The actual change in the wall, however, was completed on January 2, 1986. This is not a timely incorporation of a design change into procedures. Although a draft revision was available and may be acceptable for a brief period while a procedure was being revised, the NRC finds it unacceptable to rely on a draft (unapproved) diagram for an extended period of time.

The licensee indicated that six to eight hours would lapse before repairs needed to be implemented and that the Emergency Response Organization would be available to compensate for the incorrect diagram. However, the PORV repairs may need to be completed much earlier to support Hot Standby operations as addressed in DSP-001/002. Additionally, the licensee's commitment for Dedicated/Alternate Shutdown did not include the Emergency Response Organization/Technical Support Center (ERO/TSC).

NRC Conclusion. For the above reasons, the NRC staff concludes that this example of the violation occurred as stated.

4. On May 26-29, 1987, DSP-007 did not provide (1) specific acceptance criteria for parameters related to control and verification, (2) charts and tables required for performing necessary calculations and evaluations, and (3) the locations for local valves and breakers which were required to be operated.

Summary of Licensee's Response. The licensee states that the magnitude of fire that would require the use of DSP-007 would also require the activation of the Emergency Response Organization (ERO). Activation of the ERO would provide additional resources and personnel to assist and make recommendations for the continued safety of the plant.

The licensee argues that DSP-007 does provide specific parameters related to a controlled cooldown and depressurization of the reactor coolant system. The licensee states these parameters, when followed, allow acceptable operating conditions and that no other acceptance criteria is required.

The licensee states that the charts and tables referred to in the violation were included as references in the procedures and are available for use as needed.

The licensee states that its practice has been to list component identification within procedures. However, since the location of plant equipment is located on plant drawings, location information is typically not included in procedures due to the availability of drawings.

NRC Evaluation. See NRC Evaluation under B.1.

NRC Conclusion. See NRC conclusion under B.1.

B. *Failure to Implement Procedures.* 1. As evidenced during the walkdown of DSP-002 and DSP-007, on May 26-29, 1987, the licensee's employees failed to properly implement procedures to demonstrate dedicated shutdown capability. The personnel could not readily locate essential valves and breakers; locate necessary repair equipment such as cables and instruments; locate security keys and access required areas; locate or properly utilize required charts and tables associated with the procedures; and were unfamiliar with specific setpoints and requirements such as minimum boron concentrations or the steam generator level high band.

Summary of Licensee's Response. With respect to DSP-002, the licensee denies that any operators had difficulty during the walkthrough of this procedure.

The licensee states that DSP-007 is used to achieve cold shutdown and would not be implemented until six to eight hours after a fire. With that in mind, the licensee states that the operators in the walkthroughs were given the impression by the NRC that this procedure was to be accomplished without delay and without the assistance from any personnel or resources not in the procedure. Once again the licensee indicates that a fire of this magnitude would require the activation of the Emergency Response Operator (ERO) and the Technical Support Center (TSC). This would provide additional personnel and resources to support Operations personnel.

The licensee states that only one operator can recall having difficulty in locating a specific valve or breaker. The operator did admit he was unsure and then, using available resources, did identify the valve location. The licensee states that one operator having difficulty does not constitute a programmatic breakdown. Additionally, the licensee states it believes it unreasonable for the NRC to impose unrealistic time constraints during walkthrough scenarios.

The licensee states that it does not require operators to memorize the locations for post fire repair equipment. The repair equipment would not be required for six to eight hours following a fire, at which time additional personnel would be available to assist.

The licensee states that none of the operators who participated during the NRC walkthroughs of dedicated shutdown procedures could recall any concerns about gaining access to locked rooms. Additionally, the licensee stated that procedures addressing immediate actions designate the keys required and for those procedures where longer term actions are required, normal key control is used.

The licensee states that only one operator recalled a concern with not being able to utilize charts and tables. The operator thought that the information was included with the dedicated shutdown procedures when, in fact, it was not. When questioned by the NRC as to where the information could be located, he responded properly.

The licensee states that it does not require operators to memorize specific parameters and setpoints which are readily available in procedures and reference material. The licensee believes that memorization of this type of information increases the likelihood of personnel error. Instead the licensee places emphasis on having the procedure available to guide the operators.

NRC Evaluation. During the SSFI followup inspection, May 26–29, 1987, the licensee indicated that the additional Dedicated/Alternate Shutdown training commitments had been satisfied and that the revised procedures were in draft. In an attempt to verify the adequacy of the upgrade training and procedures, the inspectors walked several operators, including one Senior Reactor Operator (SRO) selected by the licensee, through selected procedures.

The procedures used were DSP–002 (formerly DSP–001), Hot Standby using the Dedicated/Alternate Shutdown System, DSP–006, Cold Shutdown using the Dedicated/Alternate Shutdown System, and DSP–007, RHR Pump Power Repair Procedure. DSP–001 is used under fire conditions to place the reactor in Hot Standby within approximately one hour and DSP–006 is used to achieve Cold Shutdown within 72 hours, if normal equipment is lost. Dedicated shutdown repair procedures 006 through 012 are used to provide temporary power supplies to cooldown equipment such as RHR to restore vital instrumentation and controls.

The inspector recognized that Cold Shutdown under DSP–006 and –007 was an extended process not requiring the timely response of DSP–002. Participants were advised that this was not a timed evaluation and were walked through individually versus the team concept used during the SSFI. The walkthroughs indicated that operators were still unfamiliar with the contents of DSP–006 and –007 and with the locations of essential valves and breakers. It should be noted that these deficiencies were identified after the licensee had completed the upgrade training on Dedicated/Alternate Shutdown. The licensee's response indicates that only one operator could recall difficulty in locating one valve. The fact is that during walkthroughs of DSP–007 and –006, an SRO had significant difficulty in locating numerous valves. In several instances the individual led inspectors to the wrong rooms and pointed out valves which were subsequently determined to be the wrong valves. He became disoriented and confused and admitted to the inspectors he was unfamiliar with the procedures and nad never walked them through.

The licensee maintains that six to eight hours would lapse before it would be necessary to implement repair procedures. To maintain Hot Standby and natural circulation, DSP–001 (now DSP–002) requires implementation of the PORV repair procedure as soon as possible if the PORVs are not operable, and also indicates that the RHR pump and instrumentation repair procedures should be implemented if necessary. If the extent of the fire damage was sufficient to require Cold Shutdown, the operators would proceed from DSP–001 to DSP–006 to perform a natural circulation cooldown. The prerequisites for DSP–006 require that the repair procedures to restore RHR system operability have been initiated. In addition, SROs indicated that, if they knew the fire damage was sufficient to require Cold Shutdown, they would initiate the start of these repairs as soon as the reactor was in Hot Standby or within one hour.

The licensee also implies that the NRC conclusions were based on the inability of one operator to recall the location of several valves. During the SSFI walkthroughs, the inspectors used an entire shift, including operators and supervisors, in performing DSP–001. These personnel demonstrated a number of inadequacies in knowledge of the procedures and location and operation of equipment. This was despite the fact that the licensee had conducted rehearsal drills when they learned of plans to perform the walkthroughs. During the followup inspection walkthroughs of DSP–002, several operators were used. For the walkthroughs of DSP–006 and DSP–007, the licensee provided a staff SRO. Since the performance of DSP–006 and DSP–007 does not require the time constraints as in DSP–001 and DSP–002, the inspectors preferred to walkthrough one individual at a time versus a team. Since the licensee indicated the upgrade training on Dedicated/Alternate Shutdown was completed, and with difficulties experienced by the SRO in completing the procedures, the NRC inspectors did not consider the testing of additional personnel was essential to demonstrate the need for more training.

This decision was also influenced by the licensee, who was reluctant to provide additional personnel due to manpower requirements for startup preparations. It should also be noted that since this individual was a staff SRO, the potential exists that he may have been one of the ERO/TSC members the licensee was relying on to assist operators in locating valves and equipment and performing Cold Shutdown.

Considering a worst case fire, certain plant repairs would be necessary to implement natural circulation cooldown and to achieve Cold Shutdown per Dedicated Shutdown Procedures. These repairs can be dividied into three areas as follows:

(1) Required for initiation of cooldown:

- Connection of steam generator PORV long-term nitrogen supply

(2) Required for reactor coolant system depressurization:

- Installation of temporary PROV control cables and lineup of backup nitrogen supply (if required)

(3) Required for RHR entry conditions:

- RHR pump motor cable replacement;
- Portable self contained fan units; and
- Installation of RHR flow control, flow indication, and temperature monitoring equipment.

The licensee's submittal dated May 1984 indicated that the earliest time to implement the repairs to support activity (1) would not be for six to eight hours. It appears, however, that repair of the PORVs may be necessary much sooner to support the maintenance of Hot Standby. This submittal also indicated that ten operators would be available to direct the activities of post fire repairs and to achieve Cold Shutdown. Prior to the SSFI inspection, the operators had not been trained in the directing of maintenance personnel in Cold Shutdown repairs including the location of repair materials, the routes and methodology necessary to deliver the equipment to the appropriate plant locations, or the specific locations for repair connections of cables and instruments. As a result, the commitment to have operators direct the repair activities could not have been reasonably exercised. In addition, the maintenance personnel, who operators indicated to inspectors were actually responsible, had not received in-plant training on the delivery of materials, routing of cables, or the physical repairs or temporary connections. The inspectors did request operators to gain access to the warehouse, to point out delivery routes and access, and to point out cable routing paths and repair locations, all of which demonstrated deficient operator knowledge levels. Of greater concern, however, is that the licensee had not: (1) Actually designated which group was responsible, (2) trained the personnel in-plant, and (3) preplanned the actions to be taken to achieve repairs and Cold Shutdown. Once again, the licensee's response relies heavily on support from the ERO/TSC to accomplish these evolutions and to compensate for inadequate procedures, training, and preplanning.

During the followup inspection, walkthroughs of DSP–006 and DSP–001 revealed several other concerns involving locks and access. At one point during the walkthrough of DSP–006, the SRO attempted to enter a locked room in the HP decontamination area to look for valves. He did not have a key to the door and was not sure who would. This locked door was to a closet in which were located the penetrations necessary for routing the PORV repair control cable. Also encountered during the walkthroughs of the dedicated shutdown procedures and local valve operations were rooms requiring full dress out and a pathway labeled as a high radiation area. In both cases, the operators did not appear to be sure what actions would be necessary during a severe fire, i.e., to dress out or not, to use the high radiation path or seek an alternate path. Hopefully, HP technicians would be available at this point, but training and preplanning could avoid delays and or unnecessary exposures and contamination.

In implementation of repair procedure DSP–007, the inspectors observed additional deficiencies in training and preplanning. The warehouse was not manned and Operations personnel appeared to differ in opinion as to how access would be gained. There was, in fact, a delay in gaining access to the building which housed the Dedicated/Alternate Shutdown materials. Once access was gained, the operators were requested to point out the routes that would be used to deliver the cable reels and instrument carts to the required locations in the plant. The operators appeared unsure of the correct routes, and in some cases led inspectors through normal corridors that would be difficult to access with a fork lift, particularly during the loss of normal lighting and AC power. The operators also indicated paths that passed through locked perimeter gates for which they did not have keys and were unsure who would. We realize that as time progressed support personnel would be available to provide access although this might not be in time to support PORV repairs to maintain Hot Standby under DSP–001/002. The primary concern here, once again, is that the licensee committed to provide operators to direct the Cold Shutdown repair efforts, but did not provide training or adequate preplanning to ensure effective implementation and prevent confusion.

DSP–006, requires operators to use Curve 3.4, Reactor Coolant System Pressure-Temperature Limitations for Cooldown, and steam tables to ensure adequate subcooling margin in performance of natural circulation cooldown. The operator and inspectors were at the local control station when the requirement to begin using curve 3.4 was reached. The operator could not locate the curve in DSP–006. He then pointed out a different curve in a different dedicated shutdown procedure. This curve could not be used to maintain RCS pressure-temperature limits. The operator then indicated that the curve and steam tables were probably in a procedure envelope attached to the wall of the valve room; however, they were not. The operator indicated that the station curve book would be the only place he could obtain the curve. There is a station curve book in the control room, which under the scenario was inaccessible, and in the Operations Superintendent's office outside of the plant proper. The only available option was the Operations Superintendent's office and the inspectors accompanied the operator to that location. Even when the book was located, the operator did not demonstrate an adequate ability to find and use the curve. Once again, the licensee indicates that six to eight hours would be available permitting the assistance of the ERO/TSC. Procedures, however, should be complete and provide the operator with the necessary charts and tables, particularly when they are intended for use in emergency conditions and outside of the main control room. It should be noted that charts and drawings are attached to other dedicated shutdown procedures, including DSP–001/002. Under severe fire conditions and recovery, an operator should not be expected to have to exit the plant to retrieve necessary charts and tables.

DSP–006 requires operators to verify RCS boron concentration is adequate to achieve Cold Shutdown. Three different licensed operators were asked what this concentration would be. The inspectors were given widely varying answers on what value PPM this would be. Since the procedure did not specify a specific value, as indicated in the licensee's response, and the operators had not been adequately trained, an adequate cold shutdown boron concentration could not have been insured. DSP–006 also indicates that feeding each steam generator to the high band will ensure adequate secondary water inventory prior to steam pressure decreasing below the minimum required to operate the AFW pump. Once again, the operators provided three different interpretations as to what was meant by "high band." Since a specific value was not provided in the procedure, and operator training was inadequate, adequate secondary water level could not have been assured. It should be noted that specific values are provided for other parameters in other dedicated shutdown procedures. The licensee again seeks to compensate for those inadequacies by taking credit for the availability of six to eight hours of time and the ERO/TSC for assistance.

NRC Conclusion

(1) The inspectors did not impose unrealistic constraints on operators in the walkthroughs of DSP–006 and DSP–007.

(2) There were multiple valves which could not be readily located and more than one operator was involved in these failures.

(3) The upgraded operator training between the SSFI and the followup inspection was inadequate and did not include in-plant walkthroughs of DSP–006 and DSP–007. The training, however, was represented by the licensee as being complete.

(4) The violation was not based on the inability of one operator to perform Dedicated/Alternate Shutdown.

(5) Given the procedure conditions that were in existence from July 31, 1985 until the SSFI, the licensee's response on the assistance from the ERO/TSC is not reasonable for some scenarios and was not the commitment under Appendix R and Dedicated/Alternate Shutdown.

(6) Operators (or maintenance) personnel had not been trained to direct or accomplish cold shutdown repair procedures including the location of repair equipment, equipment delivery routes and methodology, and connection

locations for temporary power and instrumentation.

(7) Despite the licensee's commitment made 2 years ago to provide ten operators to direct cold shutdown repairs, plant personnel were confused as to whether Operators or Maintenance was responsible for this area.

(8) Access areas required for Dedicated/Alternate Shutdown were inaccessible. The operators did not have keys and did not know where to look for them.

(9) Charts and tables essential for use of DSP-006 to perform natural circulation cooldown were not provided in the procedure or in the dedicated shutdown areas of the plant and operators were not familiar with the use of these curves.

(10) Minimum boron concentration and the high band of steam generator level were not defined in DSP-006 and operators indicated widely varying opinions on these values to inspectors.

The NRC staff maintains that the licensee failed to adequately implement procedures to demonstrate the ability to perform Dedicated/Alternate Shutdown. For the above reasons, the NRC staff concludes the examples of the violation set out in this area occurred as stated.

2. On March 24–25, 1987, the implementation of DSP-001 was not adequate in that the necessary communications could not be accomplished. The portable radio system, the only communication system available under this dedicated shutdown procedure, could not provide adequate communications essential to the dedicated shutdown evolutions and coordination.

Summary of Licensee's Response. The licensee states that it was aware that radio communications required during dedicated shutdown at the time of the SSFI were not up to previously demonstrated capability. The licensee states that the acceptability of the portable radio system was determined based on testing. These tests revealed a few areas in the auxiliary building where communications were weak, but by moving around communications were possible. The licensee states that it is true that the portable radio system is the only practical means of communications during the first one-half hour of the event. However, after that operators would be stationed at locations where a sound powered phone system is available and thus a second means of communications would be available.

NRC Evaluation. In a February 1984 submittal, the licensee indicated that Dedicated/Alternate Shutdown communications would be accomplished via a portable radio system and the intercom. They also committed in this submittal to upgrade the communications capability for operators at remote locations. In a supplemental submittal dated June 6, 1984, the licensee indicated that Dedicated/Alternate Shutdown communications would consist of a combination of sound powered phones and portable radios. This submittal also indicted that the routine usage of the portable radio system at H. B. Robinson provided reasonable assurance that they would be adequate for post fire safe shutdown. The NRC subsequently questioned the adequacy of the communications system to support the complex manual operator actions with the expected noise levels during post fire shutdown. The licensee once again stated that the use of these radios provides reasonable assurance that they would be adequate for post fire safe shutdown. Their submittals did not address numerous inadequacies in the licensee's communications network for Dedicated/Alternate Shutdown, including:

(1) The intercom system addressed in the first submittal would not be available under DSP-001/002 because the power source is intentionally deenergized.

(2) The sound powered phone system provides communications between only three Dedicated/Alternate control stations in the plant and cannot support the complex and manual operator actions required initially to achieve hot stanby.

(3) The portable radio repeater system was not powered from a redundant or safety-related supply. Until December 1987, the power supply was from MCC-5, a power source that would not be available with a fire in a specified zone and which also had an incorrect reenergization sequence procedure in DSP-001.

(4) The portable radio system, until after the SSFI, did not have an installed repeater to enable transmission capability between plant areas.

During testing in 1985, the licensee became aware of the deficiencies in the ability of the portable radio system. The licensee indicated to inspectors that it was determined at that time that effective radio communications could be assured only between three specific locations in the plant. This information was not provided to the NRC although it related to the ability to support post fire safe shutdown. Additionally, this information was never incorporated into training on the Dedicted/Alternate Shutdown scheme. During the SSFI walkthroughs of DSP-001, the operators were observed having extreme difficulty communicating between the dedicated shutdown locations and the SRO who was directing the evolutions. The operators ran from area to area, climbed ladders and shouted in an effort to communicate.

It was also identified by the NRC that the direction provided for restoration of Motor Control Center (MCC) 5 following international deenergization of all onsite and offsite power, in accordance with Dedicated Shutdown Procedure (DSP-001), was incorrect and would not have resulted in restoration of power to MCC 5. The response at the time of the inspection was that MCC 5 was not necessary for Dedicated/Alternate Shutdown, but as reflected in the licensee's December 17, 1987 letter, MCC 5 was the only power supply for the portable radio system repeater.

NRC Conclusion. This lack of adequate communications constitutes a major impediment to safe shutdown capability considering the complexity and nonroutine nature of the evolutions, the necessity to complete certain actions before initiating others, and the commitment to have the SRO direct and control the effort from a central location. The licensee's response acknowledges that inadequate radio communications would exist during the first half hour of Dedicated/Alternate Shutdown, but places emphasis on the availability after that of the sound powered phone system. The manual operator actions taken during the first half hour are multiple and complex and must be coordinated. The NRC maintains its position in that the communications provided for Dedicated/Alternate Shutdown were inadequate. Based on the above reasons, the NRC staff concludes this example of the violation occurred as stated.

II. Arguments for Mitigation of Civil Penalty

Summary of Licensee's Response

The licensee states there are extenuating circumstances that justify mitigating the proposed civil penalty. First, the licensee states that 100% reduction of the civil penalty is justified because of the plant's prior good performance in the fire protection area, as evidenced by the SALP Category 2 ratings in the two most recent SALP reports and the lack of any violations involving fire protection. Second, the licensee states that the NRC mischaracterized the licensee's corrective actions, which are asserted to be sufficiently prompt and effective, and satisfied its commitment to retrain the operators prior to power operation.

The licensee states that the facts described in the reply to the examples of the violation demonstrate that the specific issues do not involve a Severity Level III violation but are more appropriately characterized as a Severity Level IV violation. The licensee asserts that the NRC has not raised any issues which individually or collectively could have jeopardized the capability to safely shut down the plant. The licensee asserts that the ability to safely shut down the plant was recognized by Region II management in the enforcement conference held on June 26, 1987 and at the SALP board meeting held on October 13, 1987.

The licensee states that the situation at Robinson when compared to other recently issued fire protection enforcement actions taken (Susquehanna, Vermont Yankee, and Salem) demonstrates that the alleged violations at Robinson are simply not as safety-significant as the other three cases which involved redundant train separation violations. The licensee states that the Robinson violations are more comparable to the Severity Level IV violations given to St. Lucie in an NOV issued on may 22, 1985 which involved violations regarding emergency operating procedures for alternate shutdown.

The licensee argues for not imposing a civil penalty based on the lack of clarity in and the evolving nature of the NRC's fire protection requirements. The licensee states that the draft procedures were accepted by the NRC audit team in 1985 and the NRC had not provided guidance in Generic Letter 86-10 concerning such procedures.

NRC Evaluation

The licensee claims that additional reduction in the proposed civil penalty is justified based on the plant's good performace in the area of fire protection. The NRC originally proposed only partial mitigation when it issued this Notice. The NRC notes that the SSFI inspection was an in-depth inspection of the implementation of the procedures to safely shut down the facility in the event of a fire and thus focused on a different area than the inspections which formed the basis of the SALP report. The ratings given in SALP and the findings during routine inspections focus generally on the licensee's overall fire protection activities (i.e., maintenance of fire barriers and fire protection systems, establishment and implementation of fire watches where necessary, and the maintenance of good housekeeping practices). Therefore, the NRC concludes that only partial mitigation based on the plant's prior good performance in the general area of fire protection is appropriate.

With respect to the licensee's claim that it completed adequate corrective actions to retrain the operators prior to power operation, the NRC, prior to its follow-up inspection in May 1987, had contacted the plant personnel to assure that the NRC inspection was not performed prior to the completion of the plant's retraining program. Based on assurances that the necessary re-training had taken place, the NRC conducted its follow-up inspection. While this inspection was performed prior to the plant resuming operation, there was no indication from plant personnel before or during the follow-up inspection that any additional training activities were planned by plant personnel. As discussed above, the training levels observed by NRC inspections at this time were inadequate. Therefore, the NRC considers that the follow-up inspection was conducted at an appropriate time and at that time the licensee's corrective actions had not been adequate to assure that operators could complete the actions necessary to accomplish dedicated shutdown in the event of a fire. Therefore, escalation of the base civil penalty is considered appropriate based on the licensee's inadequate corrective actions.

The NRC disagrees with the licensee's statement that in the SALP board meeting and the enforcement conference with the licensee, Region II management recognized the capability to safely shut down the plant. Rather, Region II had emphasized during these meetings the significance of deficient procedures, the lack of adequate operator training, the lack of adequate communications. These deficiencies when viewed collectively lead the NRC to conclude that, without further evaluation, the plant would not likely have been able to adequately conduct safe shutdown evolutions in the event of a fire. NRC walk-throughs of these procedures with plant operators, who would have been called upon to perform duties during an actual fire, demonstrated that these responsible personnel would not likely have been able to promptly accomplish the complex multiple actions required for safe shutdown.

The licensee asserts that the situation at Robinson is not as severe as those for which other enforcement actions have been taken. The licensee has compared the procedural, training, and communications deficiencies at Robinson with the failure to provide adequate separation of redundant trains at the other facilities. The NRC views the deficiencies at Robinson to be equally as significant as the physical hardware problems encountered at the other plants. The inability of plant personnel to perform the necessary teps to assure the safe shutdown of the plant in the event of a fire is considered to be as safety significant as the failure to provide adequate physical separation for one train of systems necessary to achieve and maintain hot shutdown. Both of these situations involve the potential inability of the plant to achieve and maintain hot shutdown conditions in the event of a fire. Therefore, the NRC concludes that the Severity Level III classification for the Robinson violations is appropriate and is consistent with the enforcement actions taken for other fire protection violations.

The licensee argues that the lack of clarity and the evolving nature of the fire protection requirements are facts for which the NRC should consider to not impose the civil penalty. The NRC does not consider the requirements for placing procedures in effect to implement the alternative and dedicated shutdown capability, specified in 10 CFR Part 50, Appendix R, Section III.L, as lacking clarity or having an evolving nature. Implicit in the requirement to establish these procedures was the understanding that the procedures would be adequate and that personnel would be trained in the use of the procedures. The procedures themselves had numerous deficiencies. In addition, although the licensee had done some training of personnel, this training was inadequate to enable the personnel to complete the necessary actions called out by the procedures when the procedures were demonstrated in the presence of NRC inspectors. The difficulties encountered by the plant personnel demonstrated the inadequacies in the training, procedures, and communications to cope with a fire in certain plant areas.

The review of the draft procedures in 1985 had no bearing on the deficiencies identified in the implementation of the procedures found in the March-May, 1987 inspections. The NRC noted in the inspection report in 1985 that the procedures were only in draft form and that the actual training had yet to be done. The NRC recognizes that a lack of specific procedural guidance can sometimes be compensated by the use of personnel training which would instruct personnel in the proper performance of the procedure. However, in the case at Robinson, even if the procedures had been adequate, the failure to provide proper training caused a condition in which it was questionable whether the procedures could be satisfactorily accomplished.

III. NRC Conclusions

The Staff emphasizes that the examples of the violation taken as a whole including inadequate training, communications, and procedures, raises a safety concern and warrants the severity level of the violation. It is clear that licensee management, particularly at the program implementation level, was not sensitive to the importance of 10 CFR Part 50, Appendix R, requirements and the necessity to assure continued safe shutdown capability. From these violations it is clear that the review of fire protection procedures and the training on these procedures did not receive adequate plant staff or licensee management attention.

The results of the SSFI indicated, and continues to indicate, that the initial training, procedures, and communications were inadequate to reasonably assure safe shutdown capability and have been inadequate since implementation in July 1985. Additionally, from the implementation date until the SSFI was conducted, there had been no upgrades to operator or maintenance training, no requalification training, no revisions to the dedicated shutdown procedures, and no substantial improvements to radio communications.

There were many technical and human factors deficiencies observed in the dedicated shutdown procedures, which at the time of the inspection had been implemented for nearly two years. Incorrect or inadequate in any emergency procedures can contribute to operate stress and personnel error, particularly under the stress and environmental working conditions experienced during a fire. When considered with the other existing deficiencies in operator training and communications, it remains unlikely that the licensee could have effectively carried out safe shutdown of the plant under postulated fire conditions.

Of concern to the NRC is that even after numerous deficiencies were identified during the first week of the SSFI, the operations effort at upgrading training and procedures appeared minimal and was more directed toward correcting items identified by the inspectors than truly upgrading the Dedicated/Alternate Shutdown capability. Only two operations staff members were assigned to complete both training and procedures upgrade. The training staff was not utilized during this effort and operator training was primarily conducted in the classroom environment and not actually in the plant. During the followup inspection, the operations staff indicated to the inspectors that training had been completed. However, during subsequent walkthroughs with operators using the revised dedicated shutdown procedures, there continued to be deficiencies noted which indicated that in-plant walkthroughs were not included in the training. During the followup inspection, plant management committed to provide 16 hours of additional training including eight hours of in-plant walkthroughs of all dedicated shutdown procedures.

The licensee's response to the Notice of Violation and Proposed Imposition of Civil Penalty emphasizes the inspection findings in NRC Inspection Report 85–07 and the role of the Emergency Response Organization (ERO) in supporting dedicated shutdown. However, Inspection Report 85–07 was considered a pre-audit and inconclusive in that the licensee's dedicated shutdown procedures were in draft form and operations and maintenance training had not been conducted. The Inspector Follow-up Items that were referenced, in some cases, may have been violations if the procedures had been approved and the program implemented. The licensee was also informed that final inspection of the procedures could not be completed until the procedures were approved. Heavy reliance on the ERO to achieve dedicated shutdown is also cause for concern. While the engineers and personnel in the Technical Support Center (TSC) are intended to assist operators in the mitigation and recovery from accidents, it was never intended that the ERC would be utilized to compensate for inadequate Dedicated/Alternate Shutdown procedures, training, and communications.

The NRC staff has concluded for the reasons stated above that the violation occurred as stated in the Notice of Violations and Proposed Imposition of Civil Penalty. A sufficient basis for mitigation of the proposed $50,000 civil penalty has not been provided by the licnesee. Accordingly, a civil penalty in the amount of Fifty Thousand Dollars ($50,000) shoult be imposed.

VIOLATION II

Restatement of Violation II (Non-Civil Penalty)

10 CFR Part 50, Appendix R, Section III.J, requires, in part, that emergency lighting units with at least an eight-hour battery supply shall be provided in all areas needed for operation of safe shutdown equipment and in access and egress routes thereto.

Contrary to the above, on March 24–25, 1987, emergency lighting units were not provided in several areas needed for operation of safe shutdown equipment. These areas included the dedicated shutdown diesel enclosure and local operating panel, and the auxiliary feedwater (AFW) local control area. Subsequent reviews by the licensee noted additional dedicated shutdown areas where emergency lighting was nonexistent, inadequate, or improperly directed and also noted a large number of emergency lights and battery packs out for maintenance.

Summary of Licensee's Response

The licensee denies the violation as pertaining to the lack of emergency lighting provided in the dedicated shutdown diesel enclosure and local operating panel, and the AFW local control area. The licensee concurs with the NRC in its evaluation of the violation for nonexistent, inadequate or improperly directed lighting for the additional dedicated shutdown areas.

NRC Evaluation

The licensee in its response states that the dedicated shutdown diesel is remotely started and operated from the 4 kV switchgear room. This method of operation was previously approved in the August 8, 1984, Safety Evaluation Report. While attempting to perform a surveillance test during the SSFI, the operators were unable to start the dedicated shutdown diesel. Upon the failure to start, operators were dispatched to the dedicated shutdown diesel enclosure and local operating panel. Subsequent investigation revealed that the previous surveillance test had left the remote/local switch in the local position.

While the NRC agrees that the dedicated shutdown diesel may be operated remotely, without adequate assurance that maintenance or surveillance activities will not defeat the remote starting capability, the diesel may, in some cases, need to be started using the local operating panel. As was evident during the SSFI, operator action at the local operating panel was necessary to start the diesel. In addition, protracted run times may require adjustments and the monitoring of the diesel parameters. Thus, because operator actions in the diesel enclosure may be needed for the safe operation of the diesel, emergency lighting is necessary.

With regard to the emergency lighting in the auxiliary feedwater local control area, the licensee claims that action in this area is not necessary and therefore emergency lighting is not required. At the time of the NRC inspection, DSP-001, Step 5.1. specified operator actions at the local control panel. The NRC inspection revealed that appropriate emergency lighting had not been provided in this area. It was for this lack of emergency lighting in an area where the licensee's procedures required operator actions for which this example of a violation was cited. While later evaluations showed that operator actions in this area were not necessary, this has no bearing on the fact that, during the NRC inspection, operator actions had been specified in procedures in an area which did not have the appropriate emergency lighting.

As a result of the NRC inspection, the licensee identified other areas with deficient emergency lighting in areas called for in procedures.

The deficiencies in the emergency lighting could have been identified during a blackout evaluation in 1985. This evaluation resulted in a June 16, 1985, submittal to the NRC requesting exemption from Section III.J of Appendix R requirements for two specific areas identified as deficient in the licensee's evaluation. However, these were not the same areas identified in the post-SSFI evaluation as inadequate.

NRC Conclusion

For the above reason, the NRC staff concludes that the violation for failure to provide emergency lighting in required areas, including the dedicated shutdown diesel enclosure, and the local operating panel, as well as the auxiliary feedwater pump local control area, as well as others, occurred as stated.

[FR Doc. 88–19544 Filed 8–26–88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50–341]

Detroit Edison Co., Wolverine Power Supply Cooperative, Inc.; Issuance of Amendment to Facility Operating License

The United States Nuclear Regulatory Commission (the Commission) has issued Amendment No. 28 to Facility Operating License No. NPF–43, issued to the Detroit Edison Company and Wolverine Power Supply Cooperative, Inc. (the licensees), which revised the Technical Specifications (TSs) for operation of Fermi-2, located in Monroe County, Michigan. The amendment is effective as of the date of issuance.

The amendment changes the Technical Specifications to require two channels, instead of one, to be operable for the Standby Gas Treatment System Radiation Monitors. In addition, the amendment revises Action Statement 81 in Table 3.3.7.5–1 as recommended in NRC Generic Letter 83–36 and makes appropriate changes in the Technical Specification bases as a result of the change.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings, as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Hearing in connection with this action was published in the **Federal Register** on March 10, 1988 (53 FR 7819). No request for hearing or petition to intervene was filed following this notice.

Also in connection with this action, the Commission prepared an Environmental Assessment and Finding of No Significant Impact which was published in the **Federal Register** on August 11, 1988, at 53 FR 30358.

For further details with respect to this action, see (1) the application for amendment dated November 30, 1987, (2) Amendment No. 28 to License No. NPF–43, and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC 20555, and at the Monroe County library System, 3700 South Custer Road, Monroe, Michigan 48161. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III, IV, V, and Special Projects.

Dated at Rockville, Maryland, this 19th day of August 1988.

For the Nuclear Regulatory Commission.

Theodore R. Quay,

Project Manager, Project Directorate III–1, Division of Reactor Projects—III, IV, V & Special Projects.

[FR Doc. 88–19547 Filed 8–26–88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50–327]

Tennessee Valley Authority; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards; Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–77 issued to Tennessee Valley Authority (TVA or the Licensee), for the operation of the Sequoyah Nuclear Plants, Unit 1, located in Hamilton County, Tennessee.

The Licensee proposes to modify certain requirements on the upper head injection (UHI) accumulators for the Sequoyah Unit 1 (SQN) Technical Specification (TS). This is TS change 88–20 in the Licensee's application dated August 15, 1988. The proposed change would revise the SQN UHI level switch setpoint and tolerances to TS surveillance requirement (SR) 4.5.1.2.c.1. This change reflects the relationship between instrument-sensed differential pressure for the UHI water accumulator level and the delivered UHI water volume into the reactor vessel during an accident. A high differential pressure is sensed at the switch when the accumulator level is low, which correlates to the maximum injected water volume. Likewise, a low differential pressure is sensed for a high accumulator level and a minimum injected water volume.

In its application, the Licensee stated that a Condition Adverse to Quality Report (CAQR) documented that the UHI level switches and setpoints currently used for Unit I could allow more than the analytical limit of 1130.5 cubic feet of UHI water to be injected during a postulated accident. It explained that two changes in the design and configuration of the UHI system were pursued to correct this potential problem. First, the minimum delivered UHI water volume is reduced from 900 cubic feet to 850 cubic feet. This is supported by Westinghouse Electric Corporation evaluations which are described in the application. Second, a new model of level switch is being installed in the UHI system, which are essentially the same as those switches presently used except for their span. The Licensee stated that because of the span differences the switches also have different accuracy characteristics. The Licensee has determined a new setpoint and tolerances based on the new instrument characteristics. These new values are being incorporated into SR

4.5.1.2.c.1 to ensure that the delivered UHI water volumes are bounded by the volumes assumed in the large-break, loss-of-coolant accident (LOCA) analyses. This, the Licensee explained, will ensure that the offsite doses from a postulated LOCA are bounded by the analyses in Section 15.5 of the SQN Final Safety Analysis Report (FSAR).

The Licensee requested in its application that, because of the potential for this amendment request to impact the heatup and restart of Unit 1, its application be given the highest priority and processed as expeditiously as possible. The Licensee explained that entry into Mode 3, Hot Standby, above 1900 psi is contingent upon the approval of this amendment request. The Licensee further explained that, if it appears that entry into Mode 3 above 1900 psi would be delayed strictly because of proposed TS change had not yet been approved it would request a temporary waiver of compliance for SR 4.5.1.2.c.1 until the amendment had been approved.

Before issuance of the proposed amendment, the Commission will have made findings required by the Atomic Energy Act of 1954 (the Act), as amended, and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commissions' regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability of consequences of an accident previously evaluated; (2) create the possibility of new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination is provided by the Licensee in its submittal and is given below.

> TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:
>
> (1) Involve a significant increase in the probability or conseqences of an accident previously evaluated. The UHI system is designed to supply additional inventory to the reactor core during the blowdown phase of the LOCA. UHI flow to the core is terminated by automatic hydraulic isolation valves. These valves are actuated by level switches on the UHI water accumulator. The proposed change reflects a new actuation setpoint and the associated instrument tolerances for the level switches. As such, the change does not increase the probability of a previously evaluated accident. The new setpoint and tolerances were calculated based on a new level switch accuracy characteristic and a broadened UHI-delivered water volume band. Broadening the delivered water volume band did result in increased PCTs [peak clad temperatures] for the limiting cases. In all cases, however, the PCT remained below the 10 CFR 50.46 limit of 2,200°F. This in turn ensures that offsite doses remain bounded by the analyses of [SQN] FSAR Section 15.5. Because the proposed setpoint ensures that the delivered water volume remains bounded by the new analytical limits, the proposed change does not increase the consequences of by previously evaluated accident.
>
> (2) Create the possibility of a new or different kind of accident from any previously analyzed. The proposed change to the actuation setpoint and tolerances represents no modification to the UHI design or operations, which could create a new accident. The change only affects the performance of UHI for accident scenarios in which it is already assumed to function.
>
> (3) Involve a significant reduction in a margin of safety. The proposed change to SR 4.5.1.2.c.1 represents a new setpoint and accuracies for the combination of new level switches and a broadened delivered water volume band. The setpoint ensures that the delivered water volume remains between 850 and 1,130.5 cubic feet. Westinghouse analyses have indicated that delivered water volumes between these limits ensure that PCT remains below 2,200°F. Therefore, the margin of safety is not reduced by this proposed change.

In its review of the Licensee's application, the NRC staff concluded that, although the PCT remains below the limit of 2200°F in 10 CFR 50.46, the PCT does raise because of the proposed changes and there is a reduction in a margin of safety. However, the rise in PCT is not significant and the PCT remains below the limit of 2200°F. Therefore, the NRC staff concludes that the proposed changes do not involve a significant reduction in a margin of safety.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Comments should be addressed to the Rules and Procedures Branch, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice.

By September 28, 1988, the Licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license, and any person whose interest may be affected by the proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene must be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board Panel will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene must set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceedings; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which the petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference sheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, the petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions should be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the request for amendment invovles no significant hazards consideration, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the request for amendment invovles a signficant hazards consideration, any hearing held would take place before the issuance of the amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should cirumstances change during the notice such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by toll-free telephone call to Western Union at 1–800–325–6000 (in Missouri 1–800–342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Suzanne C. Black: Petitioner's name and telephone number; date petition was mailed; plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Newman & Holtzinger, P.C., 1615 L Street, NW., Washington, DC 20036, attorneys for the Licensee.

Nontimely filings of the petition for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board designated to rule on the petition and/or requests, that the request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to his action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC 20555, and at the Local Public Document Room located at the Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Dated at Rockville, Maryland, this 22 day of August 1988.

For the Nuclear Regulatory Commission.

Suzanne C. Black,

Assistant Director for Projects, TVA Projects Division, Office of Special Projects.

[FR Doc. 88–19546, Filed 8–26–88; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–26016: File No. SR–DTC–88–14]

Self Regulatory Organizations; Depository Trust Co.; Filing and Immediate Effectivenuss of Proposed Rule Change Regarding the Same-Day Funds Settlement Service

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, ("the Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on July 18, 1988, the Depository Trust Company ("DTC") filed a proposed rule change to include auction-rate and tender-rate preferred stocks and notes as eligible securities in DTC's Same-Day Funds Settlement Service ("SDFS"). The Commission is publishing this notice to solicit comment on the rule change.

SDFS began pilot operations on June 26, 1987, with transactions in municipal notes.[1] SDFS was later expanded to include zero coupon bonds backed by U.S. Government securities, municipal bonds with demand ("put") options and medium-term notes. DTC's proposal would expand SDFS eligible securities to include auction-rate and tender-rate preferred stocks and notes as eligible securities in DTC's SDFS.[2] The proposal also provides that DTC's mandatory book-entry receipt procedures apply to transactions in auction-rate and tender-rate preferred stocks and notes. Under DTC's mandatory book-entry receipt procedures, a buyer of auction-rate and tender-rate preferred stocks and notes may not reject a book-entry delivery on the basis that the buyer wanted a physical delivery unless, at the time of the trade, the buyer specified physical delivery as a term of the trade.

DTC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act in that it promotes the prompt and accurate clearance and settlement of transactions in securities. In addition, DTC believes that the proposed rule change does not adversely affect the safeguarding of securities or funds in DTC's custody or control or for which it is responsible and does not significantly affect the respective rights or obligations of DTC or persons using SDFS. According to DTC, neither DTC, SDFS participants, nor settling banks have experienced any significant operational problems in using SDFS. Based upon initial operational experience and participant requests, DTC now seeks to expand SDFS to include auction-rate and tender-rate preferred stocks and notes.

The rule change has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b–4. The Commission may summarily abrogate the rule change at any time within 60 days of its filing if it appears to the Commission that abrogation is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

You may submit written comment with 21 days after notice is published in the Federal Register. Please file six copies of your comment with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

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[1] *See* Securities Exchange Act Release No. 24689 (July 9, 1987), 52 FR 26613.

[2] As with all SDFS eligible securities, DTC imposes a haircut to insure proper collateralization of SDFS positions. The haircut for auction-rate and tender-rate preferred stocks and notes is 2%. This rate was established based upon a bank agreement to lend DTC 98% of the par value of these securities.

Copies of the submission, with accompanying exhibits, and all written comments, except for material that may be withheld from the public under 5 U.S.C. § 552, are available at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC. Copies of the filing also will be available for inspection and copying at the principal office of DTC. All submissions should refer to File No. SR-DTC-88-14.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Dated: August 22, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-19566 Filed 8-26-88 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26019; File No. SR-NASD-88-19]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Extension of Public Comment Period of Proposed Rule Change Relating to the OTC Bulletin Board Display Service

On June 9, 1988, the National Association of Securities Dealers, Inc. ("NASD") submitted a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1) and Rule 19b-4 thereunder, to establish a quotation service, the OTC Bulletin Board Display Service, respecting OTC securities that are not included in the NASDAQ System nor listed on a national securities exchange.

Notice of the proposed rule change together with terms of substance of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 25949, July 28, 1988) and by publication in the **Federal Register** (53 FR 29096, August 2, 1988).

The NASD has consented to an extension of the period for public comment on the proposed rule change, for forty-five days, until October 7, 1988.[1]

The Commission hereby extends the period for public comment on the proposed rule change for a period of forty-five days, until October 7, 1988.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Jonathan G. Katz,

Secretary.

Dated: August 23, 1988.

[FR Doc. 88-19520 Filed 8-26-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26017; File No. SR-PSE-87-13]

Self-Regulatory Organizations; Proposed Rule Change by the Pacific Stock Exchange, Incorporated; Relating to Transmission of Orders to the Index Options Trading Pit by Inter-Floor Telephones

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on April 28, 1987, the Pacific Stock Exchange, Incorporated ("PSE" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III belowk which Items have been prepared by the self-regulatory organizations. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PSE proposes to amend its rules to permit the transmission of orders into its index options trading pit by inter-floor telephones. The PSE proposes to place general access telephones in the pit which may be accessed by members in other locations on the trading floor. The proposal will allow market makers and various floor brokerage operations located on the trading floor to transmit orders to brokers located directly in the index options pit. In this regard, the PSE proposes the following amendment to Rule VI, Section 42 and to Options Floor Procedure Advices B-6 and F-5. (Brackets indicate language to be deleted; italics indicates new language.)

Rule VI. Exchange Options Trading

Sec. 42. Orders Required to be in Written Form

(a) through (c) No change.

Commentary:

.01 No change.

.02 In the case of index options, orders which have been transmitted to the floor and appropriately time-stamped may be verbally transmitted by telephone to the index trading pit. Immediately thereafter, the written time-stamped memoranda must be forwarded to the broker in the trading crowd.

Options Floor Procedure Advice B-6

Subject: Market Maker's Use of Floor Brokers to Effect Transactions for the Market Maker's Account

Section 73 of Rule VI states, in part, that "A Market Maker is an individual who is registered with the Exchange for the purpose of making transactions as dealer-specialist on the Floor," and Section 79 requires, in part, that "Transactions of a Market Maker should contribute to the maintenance of a fair and orderly market * * *." Accordingly, the Exchange believes that the special obligations and role of the Market Maker warrant that the crowd be fully aware of the Market Maker's trading activity. Pursuant to sections 73 and 79, the following special procedures will be applicable when a Market Maker has occasion to utilize the services of a Floor Broker to effect transactions for the Market Maker's account:

(1) Order Tickets

(a) If possible, the order should be prepared by the Market Maker. In all cases, the order shall be recorded on a standard phone order ticket, time-stamped, including the Market Maker's symbol in the box or boxes marked "buying firm/selling firm" and indicate whether the order is GTC or day only. Floor Brokers are reminded that all the requirements of Rule VI, Section 42, apply to Market Maker orders. When any occasion arises where verbal orders, changes or instructions must be given *in stock options,* the Floor Broker shall immediately write up and time-stamp the ticket from outside the trading crowed.

(b) through (d) No change.

(2) through (5) No change.

Options Floor Procedure Advice F-5

Subject: Means of Communication on the Options Floor

Pursuant to sections 39(b), 42, 47 and 62 of Rule VI, the Options Floor Trading Committee deems that hand signals may represent a potential for abuse in the transmission of private information not generally available to other members. Accordingly, the Committee has established the following regulations governing the proper use of hand signals on the Floor.

Hand signals may always be used to request and to relay information regarding current quotations and market size. Also, without limiting the applicability of Rule VI, Section 42, (Orders Required to be in Written Form) the use of hand signal communications on the floor of the Exchange may be used to increase or decrease the size of an order, to change the order's limit, to cancel an order or to activate a market order. *In the case of index options, it will be permissible to initiate orders through the use of hand signals and through inter-floor telephones.* Any cancellation[,] or change [of] *to* an order, *and any initiation of an index options order* relayed to a Floor Broker through the use of hand signals, *or through an inter-floor telephone,* must be relayed to the Floor Broker in a time-stamped, written form immediately thereafter. All cancellations and changes of orders held by the Order Book Official must be in written form. The executing broker who receives the communication must have a written order in his possession with all of the following information on the ticket:

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[1] *See* letter to Jonathan G. Katz, Secretary, Securities and Exchange Commission, from Frank J. Wilson, Executive Vice President and General Counsel, NASD, dated August 22, 1988.

No change to the rest of the Advice.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, the self-regulatory organizaiton included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B) and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

The PSE is proposing certain amendments to its options rules and Floor Procedure Advises to permit the use of telephones in its index options pit for the purpose of communicating orders and changes to orders directly into the pit. These phones would be for inter-floor use only, allowing floor brokerage operations and market makers on the trading floor to communicate directly into and from the trading pit. The PSE also proposes to permit the initiation of orders into the pit through these phones as well as by hand signal so long as a time-stamped order memorandum has been prepared that will immediately be forwarded to the Broker in the pit.

The PSE has been studying the manner in which index options are traded on the PSE's floor as well as on the floors of other exchanges. The PSE believes that because of potential arbitrage between index products and index futures, it is important to speed order delivery into the trading pit to ensure accurate market making and price discovey. For this reason, the PSE proposes to allow members on the floor to phone such orders and/or changes to such orders directly into the pit.[1]

The PSE believes that this proposal is entirely consistent with section 6(b)(5) of the Act because it will further remove impediments to and help perfect the mechanism of a free and open market.

(b) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes a burden on competition.

(c) Self-Regulaory Organization's Statement on Comments on the Propsed Rule Change Received from Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of the publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding; or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securites and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communication relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be availabe for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-metioned, self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by September 19, 1988.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Dated: August 23, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-19521 Filed 8-26-88; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Midwest Stock Exchange; Application for Unlisted Trading Privileges in Over-the-Counter Issues and to Withdraw Unlisted Trading Privileges in Over-the-Counter Issues

August 23, 1988.

The Midwest Stock Exchange, Inc. ("MSE") on August 15, 1988, submitted an application for unlisted trading privileges ("UTP") pursuant to section 12(f)(1)(C) of the Securities Exchange Act of 1934 ("Act") in the following over-the-counter ("OTC") securities, *i.e.*, securities not registered under section 12(b) of the Act:

File No.	Symbol	Issuer
7-3814	AMGN	Amgen, Inc., common, $0.0001 par value.
7-3815	LAGR	L.A. Gear, Inc., common, no par value.
7-3816	BBEC	Blockbuster Entertainment Corp., common, $0.10 par value.

The MSE also applied to withdraw UTP pursuant to section 12(f)(4) of the Act on the following OTC issues:

File No.	Symbol	Issuer
7-3817	CTUS	Cetus Corp., common, $0.01 par value.
7-3818	DAZY	Daisy Systems Corp., common, $0.01 par value.
7-3819	WYSE	Wyse Technology, common, no par value.

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[1] In response to inquiries from the Commission staff, the PSE has indicated that telephone calls transmitting index option orders would be answered by floor brokers in the trading pit on a first-in-time basis. If index option volume were to increase substantially from current low levels, new procedures would be developed "to apportion such orders among the floor brokers located in the index option pit." Letter from Craig R. Carberry, Director, Options Compliance, PSE, to Howard L. Kramer, Assistant Director, Division of Market Regulation, Commission, dated June 14, 1988.

The MSE applied to withdraw UTP on WYSE due to its recent listing on the New York Stock Exchange, thus rendering it ineligible for continued inclusion in the pilot program. In the case of CTUS and DAZY, replacement issues are being requested as a result of extremely low volume.

Comments

Interested persons are invited to submit on or before September 14, 1988, written comments, data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Commentators are requested to address whether they believe the requested grants of UTP would be consistent with section 12(f)(1)(C). In considering an application for extension of UTP in OTC securities under section 12(f)(1)(C), the Commission is required to consider, among other matters, the public trading activity in such security, the character of such trading, the impact of such extension on the existing markets for such securities, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system. The Commission may not grant such application if any rule of the national securities exchange making an application under 12(f)(1)(C) would unreasonably impair the ability of any dealer to solicit or effect transactions in such security for his own account, or would unreasonably restrict competition among dealers in such security or between such dealers acting in the capacity of market makers who are specialists and such dealers who are not specialists.

Commentators also should address whether the requested withdrawal of UTP would be consistent with section 12(f)(4) of the Act. That section empowers the Commission to grant a request for withdrawal if, to do so is necessary or appropriate in the public interest or for the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-19522 Filed 8-26-88; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended August 19, 1988

The following applications for certificates of public convenience and necessity and foreign air carrier permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 *et. seq.*). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tenatative order, or in appropriate cases a final order without further proceedings.

Docket No. 45755

Date Filed: August 18, 1988.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: September 15, 1988.

Description:

Application of Iberia, Lineas Aereas De Espana, S.A. pursuant to section 402 of the Act and Subpart Q of the Regulations, requests an amendment of its foreign air carrier permit so as to authorize it to engage in foreign air transportation of persons, property and mail between a point or points in Spain and Los Angeles, California.

Docket No. 45756

Date Filed: August 18, 1988.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: September 15, 1988.

Description:

Application of Iberia, Lineas Aereas De Espana, S.A. pursuant to section 402 of the Act and Subpart Q of the Regulations requests an amendment of its foreign air carrier permit so as to authorize it to engage in foreign air transportation of persons, property and mail between a point or points in Spain and Chicago, Illinois.

Docket No. 45760

Date Filed: August 19, 1988.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: September 16, 1988.

Description:

Application of Airbc Limited, pursuant to section 402 of the Act and Subpart Q of the Regulations, requests a foreign air carrier permit to carry persons and property under trans border charters, between any point or points in Canada and any point or points in the United States.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 88-19526 Filed 8-26-88; 8:45 am]

BILLING CODE 4910-62-M

Federal Aviation Administration

[Summary Notice No. PE-88-34]

Petition for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued; General Motors Corp. et al.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before September 19, 1988.

ADDRESS: send comments on any petition in triplicate to:

Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No.__________, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on August 22, 1988.

Denise D. Hall,

Manager, Program Management Staff.

Docket No.	Petitioner	Regulations affected	Description of relief sought
25643	North American Airline Training Group.	14 CFR 63.37(a) and Part 63, Appendix C, paragraphs (a)(3)(i) and (iv)(*a*) and (iv)(*b*).	To allow petitioner to utilize Boeing 727 training vehicle No. 3/0233/24 in its FAA-approved Flight Engineer Training Program.
25657	General Motors Corporation	14 CFR 21.181	To allow petitioner to operate its Cessna aircraft, model number 650, serial numbers 094, 095, 096, with three deviations from the master minimum equipment list. These deviations include allowing one analog function for the ITT Indicating System (Engine) to be inoperative if the corresponding digital function is operative, allowing comparable requirements for fan speed indicators, and allowing the mechanical indicating system for the main cabin door to be used when the electrical system is malfunctioning.

Petitions for Exemption

Docket No.	Petitioner	Regulations affected	Description of relief sought, disposition
23336	Simulator Training, Inc	14 CFR 61.63(d)(2) and (3); 61.157(d)(1) and (2); and Part 61, Appendix A.	To amend Exemption No. 4797, which allows petitioner to use FAA-approved visual simulators to meet certain training and testing requirements of the Federal Aviation Regulations. *Grant, August 17, 1988, Exemption No. 4797D.*
24770	Flight Safety International	14 CFR 61.57(a)(1) and 61.58(c)	To amend Exemption No. 4609, as amended, which permits pilots contracting with petitioner to substitute an FAA-approved helicopter training program using petitioner's training facilities for the requirements of §§ 61.57(a)(1) and 61.58(c) for the Sikorsky S-76 aircraft and § 61.57(a)(1) for the Bell 222 aircraft. *Grant, August 17, 1988, Exemption No. 4609B.*
25366	Aviall, Inc. and Caledonian Airmotive, Ltd.	14 CFR 145.47(b) and 145.51(d)	To allow petitioner to perform services including inspection, repair, maintenance, overhaul, and return to service of aircraft engines, appliances, parts and components for which petitioner is appropriately rated for installation on any U.S.-registered aircraft without geographical limitation, and in accordance with their ratings. *Partial Grant, August 15, 1988, Exemption No. 4972.*
25581	Bannock Regional Medical Center	14 CFR 135.271(g)	To allow certain crewmembers to be assigned to conduct training, public relations, and routine transportation missions while on a Hospital Emergency Medical Evacuation Service (HEMES) mission *Denial, August 17, 1988, Exemption No. 4971.*

[FR Doc. 88-19495 Filed 8-26-88; 8:45 am]

BILLING CODE 4910-13-M

Radio Technical Commission for Aeronautics (RTCA); Special Committee 135—Environmental Conditions and Test Procedures for Airborne Equipment; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given for the 12th meeting of RTCA Special Committee 135 on Environmental Conditions and Test Procedures for Airborne Equipment to be held September 21-23, 1988, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC, commencing at 9:30 a.m.

The agency for this meeting is as follows: (1) Chairman's remarks, (2) approval of minutes of the eleventh meeting, (3) review status of the FR susceptibility problem and proposed changes to § 20.1, (4) review status and new proposals for § 22.0, (5) Review § 23.0, (6) review the third draft of the proposed revision to DO-160B, (7) update change coordinator list, (8) other business, (9) date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005; (202) 682-0266. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 23, 1988.

Herbert P. Goldstein,

Designated Officer.

[FR Doc. 88-19493 Filed 8-26-88; 8:45 am]

BILLING CODE 4910-13-M

Radio Technical Commission for Aeronautics (RTCA); Special Committee 150—Minimum System Performance Standards for Vertical Separation Above Flight Level 290; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given for the 19th meeting of RTCA Special Committee 150 on Minimum System Performance Standards for Vertical Separation Above Flight Level 290, to be held September 26-27, 1988, in the RTCA Conference Room, One McPherson

Squarew, 1425 K Street, NW., Suite 500, Washington, DC, commencing at 9:30 a.m.

The agenda for this meeting is as follows: (1) Chairman's remarks, (2) approval of minutes of the eighteenth meeting, (3) working group reports, (4) resolution of MSPS issues, (5) review and discuss EUROCAE WG-30 activities, (6) review the fifth draft MSPS, (7) other business, and (8) date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005; (202) 682-0266. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 23, 1988.

Herbert P. Goldstein,

Designated Officer.

[FR Doc. 88-19494 Filed 8-26-88; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 88-14]

Stock Appraisals; Policy Statement

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of policy statement on stock appraisals.

SUMMARY: The Office of the Comptroller of the Currency (OCC) has issued Banking Bulletin 88-22 to describe methods used by the OCC to estimate the value of a bank's shares when a shareholder dissents to a conversion, consolidation, or merger involving a national bank, and to summarize the results of appraisals performed for transactions that consummated in 1985 and 1986. This notice, which provides the full text of BB 88-22, is for the benefit of persons who do not normally receive Banking Bulletins.

DATE: BB 88-22 was dated August 22, 1988.

FOR FURTHER INFORMATION CONTACT: Sheila G. Ogilvie, National Bank Examiner/Senior Licensing Policy and Systems Analyst, Bank Organization and Structure, (202) 447-1184, Office of the Comptroller of the Currency, 490 L'Enfant Plaza East, SW., Washington 20219.

SUPPLEMENTARY INFORMATION: On August 22, 1988, the OCC issued BB 88-22 describing methods used to estimate the value of a bank's shares and the appraisal results for transactions that consummated in 1985 and 1986. The full text of BB 88-22 is set out below.

To: Chief Executive Officers of National Banks, Deputy Comptrollers (District), Department and Division Heads, and Examing Personnel

Purpose

This banking bulletin is to inform all national banks of the valuation methods used by the Office of the Comptroller of the Currency to estimate the value of a bank's shares when a shareholder dissents to a conversion, consolidation or merger involving a national bank. The results of appraisals performed for transactions that consummated in 1985 and 1986 are also summarized.

References: 12 U.S.C. 214a, 215 and 215a; 12 CFR 11.590 (Item 2).

Background

Under 12 U.S.C. sections 214a, 215 and 215a, any shareholder dissenting to a conversion, consolidation, or merger involving a national bank may request from the resulting bank a valuation of the shares held by the dissenting shareholder. A committee of three appraisers (a representative of the dissenting shareholder, a representative of the resulting bank, and a third appraiser selected by the other two) is then to be formed to appraise the value of the shares. If the committee is formed and renders an appraisal that is acceptable to the dissenting shareholder, the process is complete and the appraised value of the shares is paid to the dissenting shareholder by the resulting bank. If, for any reason, the committee is not formed or if it renders an appraisal that is not acceptable to the dissenting shareholder, an interested party may request an appraisal by the Office of the Comptroller of the Currency (OCC).

The above provides only a general review of the appraisal process. The specific requirements of the process are set forth in the statutes themselves.

Methods of Valuation Used

Through its appraisal process, the OCC attempts to arrive at a fair estimate of the value of a bank's shares. After reviewing the particular facts in each case and the available information on a bank's shares, the OCC selects an appropriate valuation method, or combination of methods, to determine a reasonable estimate of the shares' value.

Market Value

The OCC uses various methods to establish the market values of shares being appraised. If sufficient trading in the shares exists and the prices are available from direct quotes from the *Wall Street Journal* or a market-maker, those quotes are considered in determining the market value. If no market value is readily available, or if the market value available is not well established, other methods of estimating market value can be used, such as the investment value and adjusted book value methods.

Investment Value

Investment value requires an assessment of the value to investors of a share in the future earnings of the target bank. Investment value is estimated by applying an average price/earnings ratio of banks with similar earnings potential to the earnings capacity of the target bank.

The peer group selection is based on location, size, and earnings patterns. If the state in which the subject bank is located provides a sufficient number of comparable banks using location, size and earnings patterns as the criteria for selection, the price/earnings ratios assigned to the banks are applied to the earnings per share estimated for the subject bank. In order to select a reasonable peer group when there are too few comparable independent banks in a location that is comparable to that of the subject bank, the pool of banks from which a peer group is selected is broadened by including one-bank holding company banks in a comparable location, and/or by selecting banks in less comparable locations, including adjacent states, that have earnings patterns similar to the subject bank.

Adjusted Book Value

As a rule, the OCC does not place any weight on "unadjusted book value." While book value is a type of value, it is based on historical acquisition costs of the bank's assets, and does not reflect investors' perceptions of the value of the bank as a going concern. The OCC does consider "adjusted book value." Adjusted book value is calculated by multiplying the book value of the target bank's assets per share times the average market price to book value ratio of comparable banking organizations. The average market price to book value ratio measures the premium or discount to book value which investors attribute to shares of similarly situated banking organizations.

Both the investment value method and the adjusted book value method present appraised values which are based on the target bank's value as a going concern. These techniques provide estimates of the market value of the shares of the subject bank.

Overall Valuation

The OCC may use more than one of the above-described methods in deriving the value of shares of stock. If more than one method is used, varying weights may be applied in reaching an overall valuation. The weight given to the value by a particular valuation method is based on how accurately the given method is believed to represent market value. For example, more weight may be given to a market value representing infrequent trading by shareholders than to the value derived from the investment value method when the subject bank's earnings trend is so irregular that it is considered to be a poor predictor of future earnings.

Purchase Premiums

For mergers and consolidations, the OCC recognizes that purchase premiums do exist and may, in some instances, be paid in the purchase of small blocks of shares. However, the payment of purchase premiums depends entirely on the acquisition or control plans of the purchasers, and such payments are not regular or predictable elements of market value. Consequently, the OCC's valuation methods do not include consideration of purchase premiums in arriving at the value of shares.

Statistical Data

The chart below lists the results of appraisals performed by the OCC for transactions that consummated in 1985 and 1986. The statistical data on book value and price/earnings ratios are provided for comparative purposes and are not necessarily relied on by the OCC in determining the value of the bank's shares. These historical data are provided to inform banks and investors about the results of past appraisals and should not be viewed as determinative for future appraisals.

In connection with disclosures given to shareholders under 12 CFR 11.590 (Item 2), banks may provide shareholders a copy of this banking bulletin or disclose the information contained herein, including the results of OCC appraisals. If the bank discloses the past results of the OCC appraisals, it should advise shareholders that (1) the OCC did not rely on all the information set forth in the chart in performing each appraisal and (2) that the OCC's past appraisals are not necessarily determinative of its future appraisals of a particular bank's shares.

APPRAISAL RESULTS

Appraisal date [1]	OCC appraisal value	Price offered	Book value	Average price/earnings ratio of peer group
1/1/85	107.05	110.00	176.29	5.3
1/2/85	73.16	NA	66.35	6.8
1/15/85	53.41	60.00	83.95	4.8
1/31/85	22.72	20.00	38.49	5.4
2/1/85	30.63	24.00	34.08	5.7
2/25/85	27.74	27.55	41.62	5.9
4/30/85	25.98	35.00	42.21	4.5
7/30/85	3,153.10	2,640.00	6,063.66	NC
9/1/85	17.23	21.00	21.84	4.7
11/22/85	316.74	338.75	519.89	5.0
11/22/85	30.28	NA	34.42	5.9
12/16/85	66.29	77.00	89.64	5.6
12/27/85	60.85	57.00	119.36	5.3
12/31/85	61.77	NA	73.56	5.9
12/31/85	75.79	40.00	58.74	12.1
1/21/86	19.93	NA	26.37	7.0
3/14/86	59.02	200.00	132.20	3.1
4/21/86	40.44	35.00	43.54	6.4
5/2/86	15.50	16.50	23.69	5.0
7/3/86	405.74	NA	612.82	3.9
7/31/86	297.34	600.00	650.63	4.4
8/2/86	103.53	106.67	136.23	NC

[1] The "Appraisal date" is the consummation date for the conversion, consolidation, or merger.

NA—Not Available.
NC—Not Computed.

For more information regarding the OCC's stock appraisal process, contact the Office of the Comptroller of the Currency, 490 L'Enfant Plaza East, SW., Washington, DC 20219, Director for Corporate Activity, Bank Organization and Structure.

J. Michael Shepherd,

Senior Deputy Comptroller.

Date: August 22, 1988.

Robert L. Clarke,

Comptroller of the Currency.

[FR Doc. 88-19528 Filed 8-26-88; 8:45 am]

BILLING CODE 4810-33-M

VETERANS ADMINISTRATION

Cooperative Studies Evaluation Committee; Meeting

The Veterans Administration gives notice under Pub. L. 92-463 as amended by section 5(c) of Pub. L. 94-409 (Federal Advisory Committee Act) that a meeting of the Cooperative Studies Evaluation Committee will be held at the Ramada Hotel, 901 North Fairfax Street, Alexandria, VA 22314 on October 18 and 19, 1988. The session of October 18 is scheduled to begin at 7:30 a.m. and end at 3:30 p.m. and the session on October 19 is scheduled to begin at 7:30 a.m. and end at 3:30 p.m. The meeting will be for the purpose of reviewing four proposed new clinical trials, one in cardiovascular, one in cancer research, one in dental root caries prevention, one in mental health research, and the progress of on-going studies concerning dental materials and gastroesophageal disease. The Committee advises the Director, Medical Research Service, through the chief of the Cooperative Studies Program on the relevance and feasibility of the studies, the adequacy of the protocols, and the scientific validity and propriety of technical details, including protection of human subjects.

The meeting will be open to the public up to the seating capacity of the room from 7:30 to 8 a.m., on October 18, 1988, to discuss the general status of the program. To assure adequate accommodations, those who plan to attend should contact Ping Huang, Coordinator, Cooperative Studies Evaluation Committee, Veterans Administration Central Office, Washington, DC (202-233-2861), prior to October 14, 1988.

The meeting will be closed from 8 a.m. to 3:30 p.m. on October 18, and from 8 a.m. to 3:30 p.m. on October 19, 1988, for consideration of specific proposals in accordance with provisions set forth in section 10(d) of Pub. L. 92-463 as amended by section 5(c) of Pub. L. 94-409 (the Federal Advisory Committee Act) and 5 U.S.C. 552b(c)(6). During this portion of the meeting, discussions and recommendations will deal with qualifications of personnel conducting the studies, staff and consultant critiques of research protocols, and similar documents, and the medical records of patients who are study subjects, the disclosure of which would constitute clearly unwarranted invasion of personal privacy.

Dated: August 22, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,

Committee Management Officer.

[FR Doc. 88-19510 Filed 8-26-88; 8:45 am]

BILLING CODE 8320-01-M

Medical Research Service Merit Review Boards; Meetings

The Veterans Administration gives notice under the Federal Advisory Committee Act, Pub. L. 92-463 as amended by Pub. L. 94-409, of the meetings of the following Federal Advisory Committees.

Merit Review Board for—	Date	Time	Location
Immunology	Sept. 19, 1988	8 a.m. to 5 p.m	Radisson Park Terrace Hotel.[1]
Do	Sept. 20, 1988	do	Do.
Hematology	Sept. 23, 1988	do	Room 19, VA Central Office.[2]
Alcoholism and Drug Dependence	Sept. 27, 1988	do	Radisson Park Terrace Hotel.[1]
Mental Health and Behavioral Sciences	Sept. 28, 1988	do	Do.
Do	Sept. 29, 1988	do	Do.
Do	Sept. 30, 1988	do	Do.
Basic Sciences	Sept. 29, 1988	do	Do.
Do	Sept. 30, 1988	do	Do.
Do	Oct. 1, 1988	do	Do.
Respiration	Oct. 2, 1988	2 p.m. to 10 p.m	Do.
Do	Oct. 3, 1988	8 a.m. to 5 p.m	Do.
Oncology	Oct. 6, 1988	do	Holiday Inn-Central.[3]
Do	Oct. 7, 1988	do	Do.
Neurobiology	Oct. 5, 1988	3 p.m. to 10 p.m.	Do.
Do	Oct 6, 1988	8 a.m. to 5 p.m	Do.
Do	Oct. 7, 1988	do	Do.
Do	Oct. 8, 1988	do	Do.
Gastroenterology	Oct. 10, 1988	do	Do.
Do	Oct. 11, 1988	do	Do.
Endocrinology	Oct. 17, 1988	do	Do.
Do	Oct. 18, 1988	do	Do.
Do	Oct. 19, 1988	do	Do.
Surgery	Oct. 22, 1988	do	Chicago Hilton & Towers.[4]
Nephrology	Oct. 24, 1988	do	Room 19, VA Central Office.
Do	Oct. 25, 1988	do	Do.
Cardiovascular Studies	Oct. 27, 1988	do	Room 119-VA Central Office.
Do	Oct. 28, 1988	do	Do.
Infectious Diseases	Oct. 28, 1988	6 p.m. to 10 p.m	Mayfair Hotel Los Angeles, CA.[5]
Do	Oct. 29, 1988	8 a.m. to 8 p.m	Do.
Do	Oct. 30, 1988	8 a.m. to 12 Noon	Do.

[1] Radisson Park Terrace Hotel, 1515 Rhode Island Avenue, NW., Washington, DC 20005.
[2] Veterans Administration Central Office, 810 Vermont Avenue, NW., Washington, DC 20420.
[3] Holiday Inn, 1501 Rhode Island Avenue, NW., Washington, DC 20005.
[4] Chicago Hilton & Towers, 720 S. Michigan Avenue, Chicago, IL 60605.
[5] Mayfair Hotel, 1256 W. Seventh Street, Los Angeles, CA 90017.

These meetings will be for the purpose of evaluating the scientific merit of research conducted in each speciality by Veterans Administration investigators working in Veterans Administration Medical Centers and clinics.

The meeting will be open to the public up to the seating capacity of the rooms at the start of each meeting to discuss the general status of the program. All of the Merit Review Board meetings will be closed to the public after approximately one-half hour from the start, for the review, discussion and evaluation of initial, and renewal research projects.

The closed portion of the meeting involves: discussion, examination, reference to, and oral review of site visits, staff and consultant critiques of research protocols, and similar documents. During this portion of the meeting, discussion and recommendations will deal with the qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, as well as research information, the premature disclosure of which would be likely to significantly frustrate implementation of proposed agency action regarding such research projects. As provided by subsection 10(d) of Pub. L. 92–463, as amended by Pub. L. 94–409, closing portions of these meetings is in accordance with 5 U.S.C., 552(c)(6) and (9)(B). Because of the limited seating capacity of the rooms, those who plan to attend should contact Dr. Arlene E. Mitchell, Assistant Director for Scientific Review, Medical Research Service, Veterans Administration, Washington, DC, (202) 233–5065 at least five days prior to each meeting. Minutes of the meetings and rosters of the members of the Boards may be obtained from this source.

Dated: August 18, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,

Committee Management Officer.

[FR Doc. 88–19509 Filed 8–26–88; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 53, No. 167
Monday, August 29, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

CITATION OF PREVIOUS ANNOUNCEMENT: 53 FR 32321.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., August 25, 1988.

CHANGES IN THE AGENDA: The Commodity Futures Trading Commission has deleted from the open meeting the following two items:

Proposed amendments to the Commodity Exchange Act in connection with international information-sharing;

Status of the implementation of the foreign options rules and other pending regulatory international matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, *Secretary of the Commission.*

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 88–19648 Filed 8–25–88; 12:21 pm]

BILLING CODE 6351-01-M

COUNCIL ON ENVIRONMENTAL QUALITY

DATE, TIME AND PLACE: Friday, September 9, 1988, 9:30 a.m., council on Environmental Quality Conference Room, First Floor, 722 Jackson Place, NW., Washington, DC 20503.

STATUS: Open.

MATTERS TO BE CONSIDERED: 1. The purpose of the meeting is to examine the consideration of global climate change impacts, including depletion of the ozone layer, sea level rise, and the "greenhouse effect", within the framework of the environmental impact assessment process under the National Environmental Policy Act (NEPA). The Council will hear representatives of several federal agencies discuss this issue, and will also entertain comments from interested parties outside of the federal government. The Council plans to issue guidance on this topic this fall.

Individuals who wish to address the Council at the meeting should contact Sara Nero, Confidential Assistant, at 395–5754, by close of business on *September 7, 1988.*

2. Others matters may be discussed.

FOR FURTHER INFORMATION CONTACT: Sara Nero, Confidential Assistant, Council on Environmental Quality, 722 Jackson Place NW., Washington, DC 20503; Telephone: (202) 395–5754.

Dinah Bear,

General Counsel.

[FR Doc. 88–19651 Filed 8–25–88; 12:31 pm]

BILLING CODE 3125-01-M

FEDERAL HOME LOAN MORTGAGE CORPORATION

DATE AND TIME: Tuesday, August 30, 1988, 9:30 a.m.

PLACE: 1776 G Street, NW., Board Room, Third Floor, Washington, DC 20006

STATUS: Closed.

CONTACT PERSON FOR MORE INFORMATION: Keith Earley, 1759 Business Center Drive, P.O. Box 4115, Reston, Virginia 22090, (703) 759–8414.

MATTERS TO BE CONSIDERED:

Closed—President's Report

Closed—Briefing on Seller/Servicer Eligibility

Closed—Mid-year Budget Report and Financial Report

Date sent to Federal Register: August 24, 1988.

Maud Mater,

Secretary.

[FR Doc. 88–19649 Filed 8–25–88; 12:21 pm]

BILLING CODE 6719-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

August 24, 1988.

TIME AND DATE: 10:00 a.m., Wednesday, August 31, 1988.

PLACE: Room 600, 1730 K Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *Paula Price* v. *Monterey Coal Company,* Docket No. LAKE 86–45–D. (Issues include whether the judge erred in dismissing the discrimination complaint).

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 20 CFR 2706.150(a)(3) and 2706.160(e).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653–5629/(202) 566–2673 for TDD Relay.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 88–19654 Filed 8–25–88; 8:45 am]

BILLING CODE 6735-01-M

32971

federal register

Monday
August 29, 1988

Part II

Department of Health and Human Services

Social Security Administration

20 CFR Part 404

Coverage of Employees of State and Local Governments; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

Coverage of Employees of State and Local Governments

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: The Social Security Administration (SSA) is revising the regulations in Subpart M of 20 CFR Part 404 to expand them and make them clearer and easier for the public to use and to reflect legislative changes under the Social Security Amendments of 1983 (Pub. L. 98–21), the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272), and the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509). These regulations contain the rules on providing Social Security coverage under Title II of the Social Security Act (the Act) for the services of employees of State and local governments and interstate instrumentalities.

DATE: With the exception of §§ 404.1203, 404.1204(a)(5) and (b), 404.1214(d), 404.1216(a), 404.1220, 404.1225, 404.1237, 404.1239, 404.1242, 404.1243, 404.1247, 404.1249, 404.1251, 404.1265, 404.1271, and 404.1272, containing information collection and recordkeeping requirements subject to Office of Management and Budget (OMB) review pursuant to the Paper Work Reduction Act of 1980, these regulations are effective beginning August 29, 1988. The statutory provisions contained in these regulations are effective as explained in **SUPPLEMENTARY INFORMATION.** Information collection and recordkeeping requirements will be effective upon OMB approval and notification to this effect will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Duane Heaton, Legal Assistant, 6401 Security Boulevard, Baltimore, Maryland 21235, (301) 594–6629.

SUPPLEMENTARY INFORMATION:

Introduction

These final regulations revise our rules on Social Security coverage of employees of State and local governments and interstate instrumentalities. These changes will improve the organization of, and clarify the current regulations. They also update the entire subpart to reflect policies and statutory amendments which are in effect but are not in current regulations.

Background

State and local government employees are exempt from mandatory coverage under Social Security. Section 218 of the Act requires that the Secretary of Health and Human Services (the Secretary), when requested by a State, shall enter into an agreement to provide retirement, survivors, disability, and hospital insurance coverage of the services of employees of a State or its political subdivisions. If an interstate instrumentality (which to the extent practicable is treated as a State) makes the request, the Secretary may enter into such an agreement. By this agreement Social Security protection is provided for the groups of employees the State brings under the agreement. State and local government employees covered under an agreement have the same benefit rights and responsibilities as other employees who have Social Security coverage. The amount of the payments made by the State for Social Security protection of State and local employees is the same as is paid by private sector employers and employees who are mandatorily covered by the Federal Insurance Contributions Act, 26 U.S.C. 3101 *et seq.* For payments due on wages paid before January 1, 1987, the State assumed full financial and reporting responsibility for the coverage provided under its agreement. The agreement may not be terminated in its entirety or with respect to any coverage group under that agreement.

All States, Puerto Rico, and the Virgin Islands have agreements with the Secretary. Currently these agreements provide coverage to approximately 10 million employees.

Delayed Effective Date

Section 7 of Pub. L. 94–202 (42 U.S.C. 405a) requires that any regulation or modification of a regulation which pertains, directly or indirectly, to the frequency or due dates for payments and reports required under section 218(e) of the Act as it read prior to the enactment of Pub. L. 99–509 not become effective until 18 months after it is published as a final rule in the **Federal Register**. Section 404.1249 affects those due dates and is discussed under "Major Changes." However, only § 404.1249(b)(2)(ii) is subject to the 18-month delayed effective date. Most of the rules in the section are already in effect and the more frequent deposit of contributions is mandated by section 342 of Pub. L. 98–21 for calendar months beginning after December 1983.

Considerations in Preparing This Comprehensive Revision

Most of the current regulations governing the coverage of employees of State and local governments were written in the 1950's and early 1960's. Some of the current rules have not been changed since they were originally published in May 1955. In preparing this comprehensive revision, we not only looked at the structure of the subpart and the language used in the current sections, but also evaluated the policies and procedures.

Comments Received Following Publication of a Notice of Proposed Rulemaking.

In order to obtain the public's views and comments before proceeding with these amendments, we published an NPRM in the **Federal Register** on May 29, 1986 at 51 FR 19468. The public was invited to submit comments pertaining to the proposed amendments within a period of 120 days from the date of the publication of the notice. The comment period closed on September 26, 1986. We received comments from six States. Each State commented on one or more provisions of the regulations. For ease of comprehension, we have condensed, summarized or paraphrased the comments and have grouped them according to the subject and issues raised. We have tried, to the extent possible, to present the comments and our response in the order in which the regulations are organized.

Comment: Two comments were made that the requirement in § 404.1226 that the State or political subdivision furnish a terminated employee with a Form W–2 or statement on the day on which wages are last paid to the employee is not needed because the requirement is not consistent with Federal income tax requirements and as a result is confusing.

Response: We are adopting this comment. Section 404.1226 is removed to reflect this change in the final regulations. Pub. L. 99–509 transfers responsibility for collecting contributions and receiving wage reports from the States to IRS for wages paid in 1987 and years later. Therefore, these requirements are within the purview of IRS rather than SSA.

Comment: Two comments were made that the subpoena provision is not needed because there has historically been good cooperation and there are already in place adequate means for securing records and information.

Response: We are not adopting this comment. We agree that there has been good cooperation. However, section 205(d) of the Act authorizes our use of the subpoena, and retaining the subpoena provision in the final regulations appropriately reflects SSA's authority to use a subpoena in the event that it would, at sometime in the future, be necessary to do so.

Comment: Two commenters suggest that § 404.1243(c) should have a cross-reference to the IRS magnetic media requirements.

Response: We are not adopting this comment. IRS frequently revises the magnetic media requirements. During these revisions, the name and publication number may change resulting in an incorrect reference in the regulations. We believe a specific request to IRS for the magnetic media requirements will be more effective than to request the information by the incorrect name or publication number.

Comment: There were several comments that electronic fund transfer would be costly to the States and deprive the States of interest from the time the deposits were made until the deposits were actually credited.

Response: We are adopting this comment. The first sentence and the parenthetical sentence at the beginning of § 404.1262 are removed. The removal of these two sentences restores the manner of payment requirements to what they were before this revision of regulations. At the time the NPRM that proposed requiring electronic transfer of funds was published, SSA was responsible for collection of contributions from the States amounting to over $4 billion per year. The potential for greater savings and efficiency by requiring electronic transfer of funds was extraordinarily high. However, with the passage of section 9002 of Pub. L. 99-509, the responsibility for collection of contributions was transferred to IRS for payments due on wages paid in 1987 and years later. As a result of this change in responsbility, deposits by the States (including Puerto Rico, the Virgin Islands, and interstate instrumentalities) to SSA now average less than $10,000 per month each. Most of this amount is from adjustments and underpayments subject to other provisions of the regulations rather than payments made in connection with filed wage reports. The savings previously estimated by requiring electronic transfer of funds are now significantly overstated. For these reasons, we are not requiring electronic transfer of funds in these final regulations, but continue to make it available to those remaining States who have not elected to use it.

Comment: There were several comments that the regulations provisions for interest payments on adjustment reports at § 404.1265 would discourage States from filing adjustment reports to make corrections and that these provisions should be reconsidered. (Two comments offered alternative proposals to be considered.)

Response: We are adopting the comments that we should reconsider the regulations provisions for interest payments on adjustment reports. While we are reconsidering this policy, we will continue to use the rules that are currently in effect. We moved the modified version of the text regarding interest payments from the former § 404.1261 (a) and (b) to § 404.1265 (b) and (c) replacing § 404.1265 (a)(2) and (b) shown in the NPRM. Section 404.1265(b) is renumbered as § 404.1265(d). Section 404.1265(d) is renumbered as § 404.1265(e). We also made editorial changes to the former paragraphs that are retained to correct the reference in § 404.1265(b)(1) to read § 404.1249, to remove the references in § 404.1265(c) to the numbered forms because these forms are obsolete, to continue the use of the IRS abbreviation for the Internal Revenue Service, and to remove the parenthetical sentence at the end of the paragraph because the reference is no longer appropriate.

Comment: One commenter suggests that the § 404.1291 proposed reconsideration by an appropriate SSA official that is to precede the review by the Secretary or someone delegated by the Secretary is an unnecessary step in the review process and should be eliminated.

Response: We are not adopting this suggestion. Our experience indicates that the reconsideration process is a cost efficient method of resolving many disagreements. Further, States requested that the reconsideration step be included during a Federal/State meeting about the review process.

Comment: Two commenters suggest that since States have only 90 days to request review, SSA should have a similar 90 days to issue the Commissioner's decision.

Response: We are not adopting this comment. The requirement that the State file a request for review does not equate to the requirements for our review of the evidence, the conducting of an audit if necessary, and the preparation of a determination. Although it may appear that the review process is lengthy, this conclusion does not recognize that there may be complex issues under review.

Changes to Take Account of Legislation Impacting on the NPRM

Section 12110 of Pub. L. 99-272 (enacted April 7, 1986) amends sections 218(f)(1) and 218(u)(3) of the Act by providing that the effective date of an agreement or modification is based on the date of mailing or delivery by other means to the Secretary. These amendments to the Act apply to agreements or modifications mailed or delivered to the Secretary on or after April 7, 1986. Sections 404.1214(e) and 404.1215(d) of these regulations are amended to include this new provision of the Act.

Section 9002 of Pub. L. 99-509 (enacted October 21, 1986) amends section 218 of the Act and Subchapter C of Chapter 21 of the Internal Revenue Code of 1954 by removing the States' fiscal liability for their political subdivisions' Social Security contributions and requiring States and political subdivisions to pay Federal Insurance Contribution Act taxes in the same manner that private employers do. Administration and collection of these taxes is transferred from SSA to IRS. The amendments are effective for payments due on wages paid in 1987 and later years. For payments due on wages paid prior to 1987, regulations in Subpart M continue to apply.

To assist in referencing, we indicated all sections in subpart M that are wholly or partially affected by the amendment of section 218 of the Act by Pub. L. 99-509. Each section title is appended with the phrase "—for wages paid prior to 1987" to show the limited applicability of that section in regard to contribution liability. Although the appended phrase may appear inappropriate for certain section titles, the appended phrase is appropriate in the context of the contribution liability. Several sections are reordered to emphasize the limited applicability, but the text remains unchanged. In § 404.1200, we explain the use of the phrase "For wages paid prior to 1987,—" to make clear the financial and reporting responsibility of the States. Also, in § 404.1242(b) last sentence, we added the phrase "For backpay awards paid prior to 1987,—" to show the responsibility extends to backpay awards.

Upon resolution of payment, reporting, and adjustment issues for years prior to 1987, we plan to remove sections or paragraphs designated "—for wages paid prior to 1987."

Section 404.1249(b)(2)(i) is rewritten to show that for agreements or modifications providing coverage of employees for periods prior to 1987, States shall pay contributions due and shall file wage reports with SSA for these periods. The payments and wage reports are due within 90 days after the date of the notice that the Secretary has signed the agreement or modification. Section 9002 of Pub. L. 99–509 provides that Subchapter C of Chapter 21 of the Internal Revenue Code of 1954 applies to wages paid in 1987 and later years.

In addition to the major changes required by statute, we made editorial changes to make the regulations clear and to provide for ease of cross reference. These changes include:

(1) Adding the phrase ", the period involved," to the definitions of "allowance of a credit or refund" and to the definition of "assessment" in § 404.1202 because we routinely provide this information in these notices;

(2) Adding a cross-reference to the Act in § 404.1206(c)(3);

(3) Updating the reference at §§ 404.1207(a) and 404.1214(c)(1) from section 218(k) of the Act to section 218(g) as provided by section 9002 of Pub. L. 99–509;

(4) Moving the second parenthetical at the end of the sentence, "(the "no" group)" in § 404.1207(b) to a location next to the group referred to and in the next sentence adding the phrase "for groups covered after 1959" for clarity;

(5) Adding the exclusion at § 404.1210(e)(1) that was in effect prior to the enactment of section 353 of Pub. L. 95–216 because this exclusion is contained in and still applies to some State agreements;

(6) Removing the reference in the second sentence of § 404.1220(b) to filing a return with the State by removing the phrase "with the State";

(7) Substituting the word "employer" for "State" in § 404.1220(e);

(8) Removing §§ 404.1221, 404.1223, and 404.1226 because the enactment of section 9002 of Pub. L. 99–509 makes reporting requirements the responsibility of IRS for wages paid in 1987 and years after;

(9) Substituting the word "employer" for "State" each place it appears in the text of § 404.1223;

(10) Removing § 404.1275 (b) and (c) because adjustment made on personal income tax returns is within the purview of IRS; and

(11) Rewriting § 404.1283(b) to conform to section 205(c)(5) of the Act to show our authority to "delete" wage entries from the earnings record rather than to "revise."

Changes To Take Account of Final Rule Published May 9, 1986, But Not Included in the NPRM Published May 29, 1986

On May 9, 1986, we published a final rule at 51 FR 17173. This final rule amended 20 CFR 404.1281(a) and 404.1286(a). At this time, we are incorporating that final rule into this final rule. The text is unchanged. However, since the revised §§ 404.1281 and 404.1286 deal with different subjects, we are incorporating the text of these sections of the final rule into the proper sections of the revision which are §§ 404.1287(a) and 404.1283(a) respectively.

Except for the changes in response to comments, statutory changes, the inclusion of the final rule that amended current §§ 404.1287(a) and 404.1283(a), and minor editorial changes, we are adopting the rules as proposed.

Summary of Changes

Definitions

Section 404.1202.

We have added a new section which contains definitions of terms which have special meanings as used throughout this subpart.

Evidence

Section 404.1203.

Section 404.1203 is a new section which describes in general terms our rules about requesting evidence from a State of wages paid to employees and contributions due on those wages. We discuss in this section what we do when we need evidence, the State's responsibility for supplying accurate wage information and any evidence needed to verify the accuracy of reports related to those wages, and what happens if a State does not submit the requested evidence.

Authorized State Officials

Section 404.1204.

This is a new section which requires that a State designate the official authorized to act on its behalf, and that it inform SSA of any change in officials or his or her authority.

What Groups of Employees May Be Covered

Sections 404.1205–404.1212.

This is a new group of sections which discuss in general terms what groups of employees may be covered, other groupings of employees and the services which may or may not be covered. We have also included a description of the referendum procedures States must follow in providing coverage to certain groups of employees. These referendum procedures reflect the requirements in sections 218(d) (3) and (7) of the Act (42 U.S.C. 418(d) (3) and (7)).

There are a number of special provisions in the Act which relate to specific States. These provisions establish procedures for a State to provide coverage for employees in specified positions. For example, section 218(d)(6)(G) of the Act (42 U.S.C. 418(d)(6)(G)) gives several States the option of providing coverage for employees in positions under a retirement system where these States are paid from Federal grants for administering unemployment compensation. Since these various provisions have limited applicability and are rarely used, we have not included them in these regulations.

How Coverage is Obtained and Continues

Sections 404.1214–404.1219.

These are new sections which generally reflect the procedures for establishing and continuing coverage under an agreement.

In § 404.1214(d) we set out what provisions an agreement must include.

Section 404.1215(b) indicates that when an agreement is modified, the State may specify a controlling date for determining retroactive coverage for employees. That controlling date can be no earlier than the date the modification is mailed or otherwise delivered to the Secretary.

Section 404.1216 describes how an agreement may be modified to correct various errors.

Section 404.1217 explains that coverage under an agreement continues indefinitely.

Sections 404.1218 and 404.1219 reflect the provisions of section 103 of Pub. L. 98–21, enacted April 20, 1983. Section 103 provides that no agreement may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983. Section 103 applies without regard to whether a notice of intent to terminate was filed before Pub. L. 98–21 was enacted. Section 103 also repealed the prohibition in former section 218(g)(3) of the Act against resumption of coverage. Coverage previously terminated may be resumed by a modification to the State's agreement.

How to Identify Employees Who Are Covered

Section 404.1220.

Section 404.1220 describes how we assign identification numbers to the State and its political subdivisions, coverage groups, etc., covered by a State's agreement.

What Records of Coverage Must Be Kept

Section 404.1225.

Section 404.1225 describes what records of an employee's remuneration a State or its political subdivisions must keep, where they are to be maintained, and for how long.

Review of Compliance by State With Its Agreement

Sections 404.1230 through 404.1234.

These regulations provide for onsite review of all pertinent source records maintained by the State or its political subdivisions. This will enable us to evaluate the records from which wage reports and contribution returns were prepared and how those records were compiled, processed, and maintained. These reviews may include discussions with the employee(s) working with those records. They would be conducted in cooperation with the State Social Security Administrator.

How to Report Wages and Contributions

Sections 404.1237 through 404.1251.

Section 404.1237 contains the basic rule that a State must report each year, by coverage group, the wages paid each covered employee during that year.

Section 404.1239 permits a State to combine the wages of an employee who performs covered services for more than one coverage group up to the annual wage limitation and pay Social Security contributions on that amount. Otherwise, the wages reported for an employee by all of the coverage groups might exceed the annual wage limitation. And the State, by paying Social Security contributions on the wages reported separately by each coverage group, would pay more than the maximum amount of Social Security contributions required each year.

Section 404.1242 is a new section which describes "back pay" to an employee and how it must be reported.

Section 404.1243 describes what means a State may use to make reports, e.g., forms, magnetic tape, etc. Section 404.1247 requires that a State shall report wages for the calendar year in which they were paid.

Section 404.1249 is the current § 404.1255a. Paragraph (a)(2) of this section contains the twice a month "frequency of deposit" rule mandated by section 342 of Pub. L. 98–21, the Social Security Amendments of 1983. Paragraph (b)(2) contains the due dates for filing contribution returns and wage reports and also the "annual reporting" rules. Paragraphs (b)(2)(i) and (b)(2)(iii) are virtually identical to current § 404.1255a(c)(2) (i) and (iii). Paragraph (b)(2)(ii) is subject to the 18 month delay in its effective date to comply with section 7 of Pub. L. 94–202 (42 U.S.C. 405a). Paragraph (c) on payments by a third party on account of sickness or accident disability is virtually identical to current § 404.1255a(a)(2) which we published in the **Federal Register** as a final rule on September 30, 1983, at 48 FR 44771. We propose to delay the effective date of only paragraph (b)(2)(ii) for 18 months after it is published as a final rule in the **Federal Register**. This delay would in no way affect the current rules that are merely incorporated in the new section, since they are already in effect. The delay would also in no way delay the effect of the "frequency of deposit" requirement since the requirement is mandated by statute.

What is a State's Liability for Contributions

Section 404.1255 and 404.1256.

Section 404.1255 describes the amount of Social Security contributions a State is liable for and when that liability begins. Section 404.1256 describes the conditions under which a State's liability for contributions may be limited when an employee performs services in one or more coverage groups.

Figuring the Amount of the State's Contributions

Sections 404.1260 through 404.1263.

These sections describe how a State's contributions are computed and when and how they must be paid.

If a State Fails To Make Timely Payments

Sections 404.1265 through 404.1267.

Section 404.1265 sets out when and how adjustment of underpayments of contributions are made if a State fails to pay timely its contributions when due under § 404.1249.

Section 404.1267, which accords with section 218(j) of the Act as it read prior to the enactment of Pub. L. 99–509, authorizes the Secretary to offset the Social Security contributions a State has not paid against amounts due a State under another provision of the Social Security Act.

How to Adjust Errors in Reports and Contributions

Sections 404.1270 through 404.1276.

Sections 404.1271, 404.1272, and 404.1275 describe how we handle payments made by a State which exceed the amount of contributions for which it is liable.

Section 404.1276 explains how we handle situations where employees' wages have been erroneously reported and Social Security contributions have been erroneously paid to the Internal Revenue Service.

How Overpayments of Contributions Are Credited or Refunded

Sections 404.1280 through 404.1284.

When a State pays more than the required amount of Social Security contributions, the State may timely request that we credit or refund the overpaid amount.

Section 404.1284 allows the Secretary, in limited situations, to offset an underpayment of contributions against an overpayment. In § 404.1284(b) we indicate the State will be given an opportunity to pay the contributions due before those amounts are offset against any credit which is due the State.

How Assessments For Underpayments of Contributions Are Made

Sections 404.1285 through 404.1289.

Section 404.1285 provides that a State is liable for an amount due under an agreement until the Secretary is satisfied the State has paid that amount. If the Secretary is not satisfied that a State has paid the correct amount, the Secretary issues an assessment for the outstanding amount.

Section 404.1286 sets out the time limits within which the Secretary must issue an assessment for an amount due. Section 404.1287 sets out exceptions to the time limits within which the Secretary must issue an assessment.

Section 404.1289 points out when we may accept a wage report which a State submits after the time periods described in § 404.1286 expire.

Secretary's Review of Decisions on Credits, Refunds, or Assessments

Sections 404.1290 through 404.1296.

These sections revise current §§ 404.1270–404.1274 and also include new sections to provide for review of appealed administrative decisions.

How a State May Seek Court Review of Secretary's Decision

Sections 404.1297 through 404.1299.

Sections 404.1297 and 404.1298 describe under what circumstances and where to file a civil action for a review of a decision by the Commissioner for the Secretary, who can file for the civil action, and the time requirements for filing. Section 404.1299 describes how payments, based upon final judgments of courts, are made.

Redesignation Table

To assist users of this document we are including a table which shows the section numbers as redesignated in these final regulations:

Redesignation Table

Former section	New section
404.1201	404.1200
404.1210	404.1201
404.1220	404.1260
404.1221	404.1260
404.1222	404.1255
404.1222a	404.1256
404.1223	404.1262
404.1224	404.1263
404.1225	404.1265
404.1226	None
404.1227	404.1267
404.1230	None
404.1240	404.1220
404.1241	None
404.1242	None
404.1243	None
404.1250	404.1237
404.1250a	404.1239
404.1250b	404.1239
404.1251	404.1247
404.1252	404.1251
404.1253	None
404.1254	404.1243
404.1255	404.1249
404.1255a	404.1249
404.1256	404.1225
404.1257	404.1237 and 404.1239
404.1260	404.1270
404.1261	404.1265
404.1262	404.1271
404.1263	404.1272
404.1264	404.1281
404.1265	404.1270
404.1266	404.1275
404.1270	404.1290
404.1271	404.1292
404.1272	404.1293
404.1273	404.1291 404.1292 404.1294 and 404.1295
404.1274	404.1296
404.1275	404.1297
404.1276	404.1298
404.1277	404.1299
404.1280	404.1286
404.1281	404.1287
404.1282	404.1289
404.1283	None
404.1284	404.1285
404.1285	404.1282
404.1286	404.1283
404.1287	404.1280
404.1290	404.1202

Regulatory Procedures

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 as the economic impact on State and local governments is less than $100 million. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act of 1980

These final rules contain information collection and recordkeeping requirements in the following sections: 404.1203, 404.1204(a)(5) and (b), 404.1214(d), 404.1216(a), 404.1220, 404.1225, 404.1237, 404.1239, 404.1242, 404.1243, 404.1247, 404.1249, 404.1251, 404.1265, 404.1271, and 404.1272. As required by section 3507 of the Paperwork Reduction Act of 1980, we will submit a copy of these rules to OMB for its review of these information collection requirements. Other organizations and individuals desiring to submit comments on the information collection requirements should direct them to the agency official designated for this purpose whose name appears in this preamble and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 3002, Washington, DC 20503, Attention: Desk Officer for HHS.

Regulatory Flexibility Act

The Secretary of the Department of Health and Human Services certifies that these regulations will not have a significant economic impact on a substantial number of small entities, including small governmental jurisdictions. Under the terms of the agreement under section 218 of the Act, a State obtains coverage for governmental entities requesting Social Security coverage. Entities which obtain coverage are now responsible for paying the contributions and filing the reports necessary to provide Social Security coverage for the services of its employees.

Some of the regulations describe the economic consequences when these responsibilities are not met. However, we expect those measures will impact on a limited number of small entities and will not have a significant economic impact on those entities. Any economic impact involved in the regulations reflecting sections 103 and 342 of Pub. L. 98–21, section 12110 of Pub. L. 99–272, and section 9002 of Pub. L. 99–509 result directly from the statutory amendments, not from the regulations.

Therefore, we believe that a regulatory analysis under the Regulatory Flexibility Act is not required.

(Catalog of Federal Domestic Assistance Programs Nos. 13.802–13.814, Social Security Programs.)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure; Death benefits, Disabled, Old-Age, Survivors, and Disability Insurance, Social Security Administration.

Dated: April 20, 1988.

Dorcas R. Hardy,

Commissioner of Social Security.

Approved: June 1, 1988.

Otis R. Bowen,

Secretary of Health and Human Services.

For the reasons set out in the preamble, 20 CFR Part 404, Subpart M is revised to read as follows:

PART 404—[AMENDED]

Subpart M—Coverage of Employees of State and Local Governments

General

Sec.
404.1200 General effect of section 218 of the Act.
404.1201 Scope of this subpart regarding coverage and wage reports and adjustments.
404.1202 Definitions.
404.1203 Evidence—for wages paid prior to 1987.
404.1204 Designating officials to act on behalf of the State.

What Groups of Employees May Be Covered

404.1205 Absolute coverage groups.
404.1206 Retirement system coverage groups.
404.1207 Divided retirement system coverage groups.
404.1208 Ineligible employees.
404.1209 Mandatorily excluded services.
404.1210 Optionally excluded services.
404.1211 Interstate instrumentalities.
404.1212 Policemen and firemen.

How Coverage Under Agreements Is Obtained and Continues

404.1214 Agreement for coverage.
404.1215 Modification of agreement.
404.1216 Modification of agreement to correct an error.
404.1217 Continuation of coverage.
404.1218 Resumption of coverage.
404.1219 Dissolution of political subdivision.

How to Identify Covered Employees

404.1220 Identification numbers.

What Records of Coverage Must Be Kept

404.1225 Records—for wages paid prior to 1987.

Review of Compliance By State With Its Agreement

404.1230 Onsite review program.
404.1231 Scope of review.
404.1232 Conduct of review
404.1234 Reports of review's findings.

How to Report Wages and Contributions—for Wages Paid Prior to 1987

404.1237 Wage reports and contribution returns—general—for wages paid prior to 1987.
404.1239 Wage reports for employees performing services in more than one coverage group—for wages paid prior to 1987.
404.1242 Back pay.

404.1243 Use of reporting forms—for wages paid prior to 1987.
404.1247 When to report wages—for wages paid prior to 1987.
404.1249 When and where to make deposits of contributions and to file contribution returns and wage reports—for wages paid prior to 1987.
404.1251 Final reports—for wages paid prior to 1987.

What Is a State's Liability for Contributions—for Wages Paid Prior to 1987

404.1255 State's liability for contributions—for wages paid prior to 1987.
404.1256 Limitation on State's liability for contributions for multiple employment situations—for wages paid prior to 1987.

Figuring the Amount of the State's Contributions—for Wages Paid Prior to 1987

404.1260 Amount of contributions—for wages paid prior to 1987.
404.1262 Manner of payment of contributions by State—for wages paid prior to 1987.
404.1263 When fractional part of a cent may be disregarded—for wages paid prior to 1987.

If a State Fails to Make Timely Payments—for Wages Paid Prior to 1987

404.1265 Addition of interest to contributions—for wages paid prior to 1987.
404.1267 Failure to make timely payments—for wages paid prior to 1987.

How Errors in Reports and Contributions Are Adjusted—for Wages Paid Prior to 1987

404.1270 Adjustments in general—for wages paid prior to 1987.
404.1271 Adjustment of overpayment of contributions—for wages paid prior to 1987.
404.1272 Refund or recomputation of overpayments which are not adjustable—for wages paid prior to 1987.
404.1275 Adjustment of employee contributions—for wages paid prior to 1987.
404.1276 Reports and payments erroneously made to Internal Revenue Service-transfer of funds—for wages paid prior to 1987.

How Overpayments of Contributions Are Credited or Refunded—for Wages Paid Prior to 1987

404.1280 Allowance of credits or refunds—for wages paid prior to 1987.
404.1281 Credits or refunds for periods of time during which no liability exists—for wages paid prior to 1987.
404.1282 Time limitations on credits or refunds—for wages paid prior to 1987.
404.1283 Exceptions to the time limitations on credits or refunds—for wages paid prior to 1987.
404.1284 Offsetting underpayments against overpayments—for wages paid prior to 1987.

How Assessments for Underpayments of Contributions Are Made—for Wages Paid Prior to 1987

404.1285 Assessments of amounts due—for wages paid prior to 1987.
404.1286 Time limitations on assessments—for wages paid prior to 1987.
404.1287 Exceptions to the time limitations on assessments—for wages paid prior to 1987.
404.1289 Payment after expiration of time limitations for assessment—for wages paid prior to 1987.

Secretary's Review of Decisions on Credits, Refunds, or Assessments—for Wages Paid Prior to 1987

404.1290 Review of decisions by the Secretary—for wages paid prior to 1987.
404.1291 Reconsideration—for wages paid prior to 1987.
404.1292 How to request review—for wages paid prior to 1987.
404.1293 Time for filing request for review—for wages paid prior to 1987.
404.1294 Notification to State after reconsideration—for wages paid prior to 1987.
404.1295 Commissioner's review—for wages paid prior to 1987.
404.1296 Commissioner's notification to the State—for wages paid prior to 1987.

How a State May Seek Court Review of Secretary's Decision—for Wages Paid Prior to 1987

404.1297 Review by court—for wages paid prior to 1987.
404.1298 Time for filing civil action—for wages paid prior to 1987.
404.1299 Final judgments—for wages paid prior to 1987.

Authority: Secs. 205, 218, and 1102 of the Social Security Act; 42 U.S.C. 405, 418, and 1302; sec. 12110 of Pub. L. 99-272, 100 Stat. 287, sec. 9002 of Pub. L. 99-509, 100 Stat. 1970.

Subpart M—Coverage of Employees of State and Local Governments

General

§ 404.1200 General effect of section 218 of the Act.

Under section 218 of the Social Security Act (the Act) a State may ask the Secretary of Health and Human Services to enter into an agreement to extend Federal old-age, survivors, disability and hospital insurance coverage to groups of employees of the State and its political subdivisions. The Secretary shall enter into such an agreement. State and local government employees, after being covered under an agreement, have the same benefit rights and responsibilities as other employees who are mandatorily covered under the programs. For payments due on wages paid before 1987, the State assumes full financial and reporting responsibility for all groups covered under its agreement. The agreement may not be terminated in its entirety or with respect to any coverage group under that agreement. For payments due on wages paid in the year 1987 and years later, section 9002 of Pub. L. 99–509 amends section 218 of the Act by transferring responsibility for collecting contributions due and receiving wage reports from the Social Security Administration (SSA) to the Internal Revenue Service (IRS). Sections of the regulations wholly or partly affected by this amendment to the Act are appended with the phrase "—for wages paid prior to 1987."

§ 404.1201 Scope of this subpart regarding coverage and wage reports and adjustments.

This subpart contains the rules of SSA about:

(a) Coverage—

(1) How a State enters into and modifies an agreement; and

(2) What groups of employees a State can cover by agreement.

(b) Contributions, wage reports, and adjustments—for wages paid prior to 1987—

(1) How a State must identify covered employees and what records it must keep on those employees;

(2) Periodic reviews of the source records kept on covered employees;

(3) How and when a State must report wages and pay contributions;

(4) What the State's liability for contributions is and how SSA figures the amount of those contributions;

(5) What happens if a State fails to pay its contributions timely;

(6) How errors in reports and contribution payments are corrected;

(7) How overpayments of contributions are credited or refunded;

(8) How assessments are made if contributions are underpaid; and

(9) How a State can obtain administrative or judicial review of a decision on a credit, refund, or assessment.

§ 404.1202 Definitions.

(a) Terms which have special meaning in this subpart are described in this section. Where necessary, further explanation is included in the section where the term is used.

(b) Coverage terms:

Agreement—The agreement between the Secretary of Health and Human Services and the State containing the conditions under which retirement, survivors, disability and hospital insurance coverage is provided for State and local government employees.

Coverage—The extension of Social Security protection (retirement, survivors, disability, and hospital insurance) by agreement between the Secretary of Health and Human Services and a State to employees of the State and its political subdivisions or by agreement between the Secretary of Health and Human Services and an interstate instrumentality to employees of the interstate instrumentality.

Coverage group—The grouping by which employees are covered under an agreement.

Employee—An employee as defined in section 210(j) of the Act. Usually, the common-law control test is used in determining whether an employer-employee relationship exists. The term also includes an officer of a State or political subdivision.

Governmental function—The traditional functions of government: legislative, executive, and judicial.

Interstate instrumentality—An independent legal entity organized by two or more States to carry out one or more functions. For Social Security coverage purposes under section 218 of the Act, an interstate instrumentality is treated, to the extent practicable, as a "State."

Modification—A change to the agreement between the Secretary of Health and Human Services and a State which provides coverage of the services of employees not previously covered or which alters the agreement in some other respect.

Political subdivision—A separate legal entity of a State which usually has specific governmental functions. The term ordinarily includes a county, city, town, village, or school district, and in many States, a sanitation, utility, reclamation, drainage, flood control, or similar district. A political subdivision includes an instrumentality of a State, one or more politicial subdivisions of a State, or a State and one or more of its political subdivisions.

Proprietary function—A business engaged in by a State or political subdivision such as a public amusement park or public parking lot.

Retirement system—A pension, annuity, retirement, or similar fund or system established by a State or political subdivision.

Secretary—The Secretary of Health and Human Services or authorized delegate.

SSA—The Social Security Administration.

State—Includes the fifty States, Puerto Rico, and the Virgin Islands. It does not include the District of Columbia, Guam or American Samoa. "State" also refers to an interstate instrumentality where applicable.

We—The Social Security Administration.

(c) Contributions, wage reporting, and adjustment terms—for wages paid prior to 1987:

Allowance of a credit or refund—The written notice to a State of the determination by SSA of the amount owed to the State by SSA, the period involved, and the basis for the determination.

Assessment—The written notice to a State of the determination by SSA of the amount (contributions or accrued interest) owed to SSA by the State, the period involved, and the basis for the determination.

Contributions—Payments made under an agreement which the State deposits in a Federal Reserve bank. The amounts are based on the wages paid to employees whose services are covered under an agreement. These amounts are equal to the taxes imposed under the Internal Revenue Code on emp1oyers and employees in private employment.

Contribution return—Form used to identify and account for all contributions actions.

Disallowance of a State's claim for credit or refund—The written notice to a State of the determination by SSA that the State's claim for credit or refund is denied, the period involved, and the basis for the determination.

Overpayment—A payment of more than the correct amount of contributions or interest.

Underpayment—A payment of less than the correct amount of contributions or interest.

Wage Reports—Forms used to identify employees who were paid wages for covered employment and the amounts of those wages paid. This includes corrective reports.

§ 404.1203 Evidence—for wages paid prior to 1987.

(a) *State's responsibility for submitting evidence.* The State, under the provisions of the agreement, is responsible for accurately reporting the wages paid employees for services covered by the agreement and for paying the correct amount of contributions due on those wages. This responsibility includes submitting evidence to verify the accuracy of the reports and payments.

(b) *Failure to submit requested evidence.* The State is required to submit information timely to SSA. If we request additional evidence to verify the accuracy of reports and payments, we specify when that evidence must be submitted. If we do not receive the evidence timely, and the State provides no satisfactory explanation for its failure to submit the evidence timely, we may proceed, if appropriate, on the basis of the information we have. Proceeding on the basis of the information we have permits us to credit the wage records of employees properly, where possible, while continuing to work with the State to resolve remaining discrepancies.

§ 404.1204 Designating officials to act on behalf of the State.

(a) Each State which enters into an agreement shall designate the official or officials authorized to act on the State's behalf in administering the agreement. Each State shall inform SSA of the name, title, and address of the designated official(s) and the extent of each official's authority. For example, a State may indicate that the State official is authorized:

(1) To enter into an agreement and execute modifications to the agreement; and

(2) To carry out the ministerial duties necessary to administer the agreement.

For wages paid prior to 1987:

(3) To enter into agreements to extend or re-extend the time limit for assessment or credit;

(4) To make arrangements in connection with onsite reviews; and

(5) To request administrative review of an assessment, an allowance of a credit or refund, or a disallowance of a credit or refund.

(b) Each State shall inform SSA timely of changes in designated officials or changes in their authority.

What Groups of Employees May Be Covered

§ 404.1205 Absolute coverage groups.

(a) *General.* An absolute coverage group is a permanent grouping of employees, e.g., all the employees of a city or town. It is a coverage group for coverage and reporting purposes. When used for coverage purposes, the term refers to groups of employees whose positions are not under a retirement system. An absolute coverage group may include positions which were formerly under a retirement system and, at the State's option, employees who are in positions under a retirement system but who are ineligible (see § 404.1208) to become members of that system.

(b) *What an absolute coverage group consists of.* An absolute coverage group consists of one of the following employee groups:

(1) State employees performing services in connection with the State's governmental functions;

(2) State employees performing services in connection with a single proprietary function of the State;

(3) Employees of a State's political subdivision performing services in connection with that subdivision's governmental functions;

(4) Employees of a State's political subdivision performing services in connection with a single proprietary function of the subdivision;

(5) Civilian employees of a State's National Guard units; and

(6) Individuals employed under an agreement between a State and the U.S. Department of Agriculture as agricultural products inspectors.

(c) *Designated coverage groups.* A State may provide coverage for designated (i.e., selected) absolute coverage groups of the State or a political subdivision. When coverage is extended to these designated groups, the State must specifically identify each group as a designated absolute coverage group and furnish the effective date of coverage and any optional exclusion(s) for each group. Where a State has provided coverage to designated absolute coverage groups, the State may, by modifying its agreement, extend that coverage to any absolute coverage group in the State.

§ 404.1206 Retirement system coverage groups.

(a) *General.* Section 218(d) of the Act authorizes coverage of services of employees in positions under a retirement system. For purposes of obtaining coverage, a system may be considered a separate retirement system authorized by section 218(d)(6) (A) or (B) of the Act. Under this section of the Act a State may designate the positions of any one of the following groupings of employees as a separate retirement system:

(1) The entire system;

(2) The employees of the State under the system;

(3) The employees of each political subdivision in the State under the system;

(4) The employees of the State and the employees of any one or more of the State's political subdivisions;

(5) The employees of any combination of the State's political subdivisions;

(6) The employees of each institution of higher learning, including junior colleges and teachers colleges; or

(7) The employees of a hospital which is an integral part of a political subdivision.

If State law requires a State or political subdivision to have a retirement system, it is considered established even though no action has been taken to establish the system.

(b) *Retirement system coverage groups.* A retirement system coverage group is a grouping of employees in positions under a retirement system. Employees in positions under the system have voted for coverage for the system by referendum and a State has provided coverage by agreement or modification of its agreement. It is not a permanent grouping. It exists only for referendum and coverage purposes and is not a separate group for reporting purposes. Once coverage has been obtained, the retirememt system coverage group becomes part of one of the absolute coverage groups described in § 404.1205(b).

(c) *What a retirement system coverage group consists of.* A retirement system coverage group consists of:

(1) Current employees—all employees whose services are not already covered by the agreement, who are in positions covered by the same retirement system on the date an agreement or modification of the agreement is made applicable to the system;

(2) Future employees—all employees in positions brought under the system after an agreement or modification of the agreement is signed; and

(3) Other employees—all employees in positions which had been under the retirement system but which were not under the retirement system when the group was covered (including ineligibles who had been optionally excluded from coverage under section 218(c)(3)(B) of the Act).

(d) *Referendum procedures.* Prior to signing the agreement or modification, the governor or an official of the State named by the governor (for an interstate instrumentality, its chief executive officer) must certify to the Secretary that:

(1) All eligible employees were given at least 90 days' notice of the referendum;

(2) All eligible employees were given an opportunity to vote in the referendum;

(3) Only eligible employees were permitted to vote in the referendum;

(4) Voting was by secret written ballot on the question of whether service in positions covered by the retirement system should be included under an agreement;

(5) The referendum was conducted under the supervision of the governor or agency or individual named by him; and

(6) A majority of the retirement system's eligible employees voted for coverage under an agreement.

The State has two years from the date of a favorable referendum to enter into an agreement or modification extending coverage to the retirement system coverage group. If the referendum is unfavorable, another referendum cannot be held until at least one year after that unfavorable referendum.

(e) *Who is covered.* If a majority of the eligible employees in a retirement system vote for coverage, all employees in positions in that retirement system become covered.

(f) *Coverage of employees in positions under more than one retirement system.*

(1) If an employee occupies two or more positions each of which is under a different retirement system, the employee's coverage in each position depends upon the coverage extended to each position under each system.

(2) If an employee is in a single position which is under more than one retirement system (because the employee's occupancy of that position permits her or him to become a member of more than one retirement system), the employee is covered when the retirement system coverage group including her or his position is covered under an agreement unless (A) he or she is not a member of the retirement system being covered and (B) he or she is a member of a retirement system which has not been covered. This rule also applies to the coverage of services in policemen's and firemen's positions in interstate instrumentalities and in those States named in § 404.1212(c)(1).

§ 404.1207 Divided retirement system coverage groups.

(a) *General.* Under section 218(d)(6)(C) of the Act certain States and under section 218(g)(2) of the Act all interstate instrumentalities may divide a retirement system based on whether the employees in positions under that system want coverage. The States having this authority are Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin.

(b) *Divided retirement system coverage group.* A divided retirement system coverage group is a grouping under a retirement system of positions of members of the system who voted for coverage and positions of individuals who become members of the system (the "yes" group), and positions of members of the system who did not elect coverage (the "no" group) and ineligible employees (see § 404.1208). For purposes of this section for groups covered after 1959, the term "member" also includes individuals who have an option to become members of the retirement system but have not done so. The position of a member in the "no" group can be covered if, within two years after the agreement or modification extending coverage to the "yes" group is executed, the State provides an opportunity to transfer the position to the covered "yes" group and the individual occupying the position makes a written request for the transfer. The members of the "no" group can also be covered if, by referendum, a majority of them vote for coverage. If the majority votes for coverage, all positions of the members of the "no" group become covered. There is no further subdivision of the "no" group into those who voted for and those who voted against coverage. If the State requests, the ineligibles in the "no" group may become part of the "yes" group and have their services covered.

(c) *Referendum procedures.* To divide a retirement system, the State must conduct a referendum among the system's employees. If the system is to be divided, the governor or an individual named by him must certify to the Secretary that:

(1) The referendum was held by written ballot on the question of whether members of a retirement system wish coverage under an agreement;

(2) All members of the retirement system at the time the vote was held had the opportunity to vote;

(3) All members of the system on the date the notice of the referendum was issued were given at least 90 days' notice regarding the referendum;

(4) The referendum was conducted under the supervision of the governor or agency or person designated by him; and

(5) The retirement system was divided into two parts, one composed of positions of members of the system who voted for coverage and the other composed of the remaining positions under the retirement system.

After the referendum the State may include those members who chose coverage under its agreement as a retirement system coverage group. The State has two years from the date of the referendum to enter into an agreement or modification extending coverage to that group.

§ 404.1208 Ineligible employees.

(a) *Definition.* An ineligible is an employee who, on first occupying a position under a retirement system, is not eligible for membership in that system because of a personal disqualification like age, physical condition, or length of service.

(b) *Coverage of ineligible employees.* A State may, in its agreement or any modification to the agreement, provide coverage for the services of ineligible employees in one of three ways:

(1) As part of or as an addition to an absolute coverage group;

(2) As part of a retirement system coverage group covering all positions under the retirement system; or

(3) As part of or as an addition to a retirement system coverage group composed of those members in positions in a retirement system who chose coverage.

§ 404.1209 Mandatorily excluded services.

Some services are mandatorily excluded from coverage under a State's agreement. They are:

(a) Services of employees who are hired to relieve them from unemployment;

(b) Services performed in an institution by a patient or inmate of the institution;

(c) Transportation service subject to the Federal Insurance Contributions Act;

(d) Certain emergency services in case of fire, storm, snow, volcano, earthquake, flood or other similar emergency; and

(e) Services other than agricultural labor or student services which would be excluded from coverage if performed for a private employer.

§ 404.1210 Optionally excluded services.

Certain services and positions may, if the State requests it, be excluded from coverage. These exclusions may be applied on a statewide basis or selectively by coverage groups. They are:

(a) Services in any class or classes of elective positions;

(b) Services in any class or classes of part-time positions;

(c) Services in any class or classes of positions where the pay is on a fee basis;

(d) Any agricultural labor or student services which would also be excluded if performed for a private employer; and

(e) Services performed by election officials or election workers if the payments for those services:

(1) In a calendar quarter are less than $50; or

(2) For modifications executed after 1977, in a calendar year are less than $100.

§ 404.1211 Interstate instrumentalities.

For Social Security coverage purposes under section 218 of the Act, interstate instrumentalities are treated, to the extent practicable, as States, that is:

(a) They must be legally authorized to enter into an agreement with the Secretary;

(b) They are subject to the same rules that are applied to the States;

(c) They may divide retirement systems and cover only the positions of members who want coverage; and

(d) They may provide coverage for firemen and policemen in positions under a retirement system.

§ 404.1212 Policemen and firemen.

(a) *General.* For Social Security coverage purposes under section 218 of the Act, a policeman's or fireman's position is any position so classified under State statutes or court decisions. Generally, these positions are in the organized police and fire departments of incorporated cities, towns, and villages. In most States, a policeman is a member of the "police" which is an organized civil force for maintaining order, preventing and detecting crimes, and enforcing laws. The terms "policeman" and "fireman" do not include services in positions which, although connected with police and firefighting functions, are not policeman or fireman positions.

(b) *Providing coverage.* A State may provide coverage of:

(1) Policemen's and firemen's positions not under a retirement system as part of an absolute coverage group;

(2) Policemen's or firemen's positions, or both, as part of a retirement system coverage group for the States specified in paragraph (c)(1) of this section; or

(3) Firemen's positions only as a separate retirement system as set forth in paragraph (c)(2) of this section.

(c) *Policemen and firemen in positions under a retirement system.* (1) Some States and all interstate instrumentalities may provide coverage for employees in policemen's or firemen's positions, or both, which are under a retirement system by following the majority vote referendum procedures in § 404.1206(d). The States are Alabama, California, Florida, Georgia, Hawaii, Idaho, Kansas, Maine, Maryland, Mississippi, Montana, New York, North Carolina, North Dakota, Oregon, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Washington. Some States and all interstate instrumentalities may use the desire for coverage procedures in § 404.1207. The States are California, Florida, Georgia, Hawaii, New York, North Dakota, Tennessee, Texas, Vermont, and Washington.

(2) All States not listed in paragraph (c)(1) of this section may provide coverage for employees in firemen's positions which are under a retirement system by:

(i) Following the referendum procedures in § 404.1206(d); and

(ii) Submitting a certification by the governor, or an individual named by her or him, to the Secretary that extending coverage to this group of employees will improve their overall benefit protection.

How Coverage Under Agreements Is Obtained and Continues

§ 404.1214 Agreement for coverage.

(a) *General.* A State may enter into a written agreement with the Secretary to provide for Social Security coverage for its employees or the employees of one or more of its political subdivisions. An interstate instrumentality may enter into a similar agreement for its employees. These agreements cover employees in groups of positions or by types of services rather than the individual employees.

(b) *Procedures.* A State or interstate instrumentality may request coverage by submitting to SSA a proposed written agreement for the desired coverage.

(c) *Authority to enter into an agreement for coverage*—(1) *Federal law.* Section 218(a) of the Act requires the Secretary to enter into an agreement, at the request of the State, to extend Social Security coverage to the State's employees or those of its political subdivisions. Section 218(g) authorizes the Secretary to enter into an agreement, at the request of an interstate instrumentality, to extend Social Security coverage to the employees of the interstate instrumentality.

(2) *State law.* State law must authorize a State or an interstate instrumentality to enter into an agreement with the Secretary for Social Security coverage.

(d) *Provisions of the agreement.* The agreement must include:

(1) A description of the specific services to be covered and excluded;

(2) The State's promise to pay, to the Secretary of the Treasury, contributions equal to the sum of the taxes which would be required under the Federal Insurance Contributions Act from employers and employees if the employment were in the private sector;

(3) The State's promise to comply with the regulations the Secretary prescribes for carrying out the provisions of section 218 of the Act; and

(4) Identification of the political subdivisions, coverage groups, or services being covered and the services that are excluded.

The agreement must be signed by the authorized State or interstate instrumentality official and the Secretary or his or her designee.

(e) *Effective date.* The agreement must specify an effective date of coverage. However, the effective date cannot be earlier than the last day of the sixth calendar year preceding the year in which the agreement is mailed or delivered by other means to the Secretary. The agreement is effective after the effective date.

(f) *Applicability of agreement.* The agreement establishes the continuing relationship between the Secretary and the State or interstate instrumentality except as it is modified (see §§ 404.1215–404.1217).

§ 404.1215 Modification of agreement.

(a) *General.* A State or interstate instrumentality may modify in writing its agreement, for example, to:

(1) Exclude, in limited situations, employee services or positions previously covered;

(2) Include additional coverage groups; or

(3) Include as covered services:

(i) Services of covered employees for additional retroactive periods of time; and

(ii) Services previously excluded from coverage.

(b) *Controlling date for retroactive coverage.* A State may specify in the modification a date to make all individuals in the coverage group who were in an employment relationship on that date eligible for retroactive coverage. This date is known as the controlling date for retroactive coverage. It can be no earlier than the date the modification is mailed or otherwise delivered to the Secretary nor can it be later than the date the modification is signed by the Secretary. If the State does not designate a controlling date, the date the modification is signed by the Secretary is the controlling date.

(c) *Conditions for modification.* The provisions of section 218 of the Act which apply to the original agreement also apply to a modification to the agreement.

(d) *Effective date.* Generally, a modification must specify an effective date of coverage. However, the effective date cannot be earlier than the last day of the sixth calendar year preceding the year in which the modification is mailed or delivered by other means to the Secretary. The modification is effective after the effective date.

§ 404.1216 Modification of agreement to correct an error.

(a) *General.* If an agreement or modification contains an error, the State may correct the error by a subsequent modification to the agreement. For example, the agreement or modification incorrectly lists a covered service as an optionally excluded service or shows an improper effective date of coverage. In correcting this type of error, which affects the extent of coverage, the State must submit a modification along with evidence to establish that the error occurred. However, a modification is not needed to correct minor typographical or clerical errors. For example, an agreement or modification incorrectly lists School District No. 12 as School District No. 13. This type of error can be corrected based on a written request from the appropriate official of the State or interstate instrumentality.

(b) *Correction of errors involving erroneous reporting to the IRS—for wages paid prior to 1987.* Where a State or political subdivision makes reports and payments to the Internal Revenue Service under the provisions of the Federal Insurance Contributions Act which apply to employees in private employment in the mistaken belief that this action would provide coverage for its employees, the State may provide the desired coverage for those same periods of time by a subsequent modification to its agreement. If State law permits, the State may make that coverage effective with the first day of the first period for which the erroneous reports and payments were made. (In this instance, the limitation on retroactive coverage described in § 404.1215(d) is not applicable.) Where the State does not want to provide such retroactive coverage or is not permitted to do so by State law, the State may provide the coverage for the affected coverage group as of a specified date (§ 404.1215(b)). The coverage would then apply to the services performed by individuals as members of the coverage group

(1) Who were employees on that date, and

(2) Whose wages were erroneously reported to IRS, and

(3) For whom a refund of FICA taxes has not been obtained at the time the Secretary executes the modification.

§ 404.1217 Continuation of coverage.

The coverage of State and local government employees continues as follows:

(a) *Absolute coverage group.* Generally, the services of an employee covered as a part of an absolute coverage group (see § 404.1205) continue to be covered indefinitely. A position covered as a part of an absolute coverage group continues to be covered even if the position later comes under a retirement system. This includes policemen's and firemen's positions which are covered with an absolute coverage group.

(b) *Retirement system coverage group.* Generally, the services of employees in positions covered as a part of a retirement system coverage group continue to be covered indefinitely. For a retirement system coverage group made up of members who chose coverage, a position continues to be covered until it is removed from the retirement system and is no longer occupied by a member who chose coverage or by a new member of the system. Coverage is not terminated because the positions are later covered under additional retirement systems or removed from coverage under a retirement system, or because the retirement system is abolished with respect to the positions. However, if the retirement system has been abolished, newly created or reclassified positions or positions in a newly created political subdivision cannot be covered as a part of the retirement system coverage group. If the retirement system is not abolished, a newly created or reclassified position is a part of the coverage group if the position would have been a part of the group had it existed earlier. If the retirement system coverage group is made up of members who chose coverage, the newly created or reclassified position is a part of the coverage group if it is occupied by a member who chose coverage or by a new member.

§ 404.1218 Resumption of coverage.

Before April 20, 1983, an agreement could be terminated in its entirety or with respect to one or more coverage groups designated by the State. Coverage of any coverage group which has been previously terminated may be resumed by a modification to the agreement.

§ 404.1219 Dissolution of political subdivision.

If a political subdivision whose employees are covered under the agreement is legally dissolved, the State shall give us satisfactory evidence of its dissolution or nonexistence. The evidence must establish that the entity is not merely inactive or dormant, but that it no longer legally exists. We will notify the State whether the evidence is satisfactory.

How to Identify Covered Employees

§ 404.1220 Identification numbers.

(a) *State and local government.* (1) When a State enters into an agreement with the Secretary under section 218 of the Act, SSA assigns one identification number to the State (if State employees are covered under the agreement) and one identification number to each political subdivision included under the agreement. Similarly, in the case of an agreement with an interstate instrumentality, SSA assigns one identification number to the instrumentality. SSA notifies the appropriate official of the State or instrumentality of the number assigned.

(2) If a State or political subdivision is paying wages for covered transportation service (as determined under section 210(k) of the Act) which are subject to the Federal Insurance Contributions Act, the appropriate IRS Service Center assigns an identification number to the State or political subdivision. The IRS Service Center procedures for issuing identification numbers to States or political subdivisions may be found in 26 CFR 31.6011(b)–1.

(b) *Coverage group number for coverage groups.* If a State's agreement provides coverage for a State or a political subdivision based on designated proprietary or governmental functions, the State shall furnish a list of those groups. The list shall identify each designated function and the title and business address of the official responsible for filing each designated group's wage report. SSA assigns a coverage group number to each designated group based on the information furnished in the list.

(c) *Unit numbers for payroll record units.* SSA assigns, at a State's request, unit numbers to payroll record units within a State or political subdivision. When a State requests separate payroll record unit numbers, it must furnish the following:

(1) The name of each payroll record unit for the coverage group; and

(2) The title and business address of the official responsible for each payroll unit.

(d) *Unit numbers where contribution amounts are limited—for wages paid prior to 1987.* An agreement, or modification of an agreement, may provide for the computation of contributions as prescribed in § 404.1256 for some employees of a political subdivision. In this situation, SSA assigns special unit numbers to the political subdivision to identify those employees. SSA does not assign a special unit number to a political subdivision in which the contributions for all employees are computed as prescribed in § 404.1256.

(e) *Use.* The employer shall show the appropriate SSA issued identifying number, including any coverage group or payroll record unit number, on records, reports, returns, and claims to report wages, adjustments, and contributions.

What Records of Coverage Must Be Kept

§ 404.1225 Records—for wages paid prior to 1987.

(a) *Who keeps the records.* Every State which enters into an agreement shall keep, or require the political subdivisions whose employees are included under its agreement to keep, accurate records of all remuneration (whether in cash or in a medium other than cash) paid to employees performing services covered by that agreement. These records shall show for each employee:

(1) The employee's name, address, and Social Security number;

(2) The total amount of remuneration (including any amount withheld as contributions or for any other reason) and the date the remuneration was paid and the period of services covered by the payment;

(3) The amount of remuneration which constitutes wages (see § 404.1041 for wages and §§ 404.1047–404.1059 for exclusions from wages); and

(4) The amount of the employee's contribution, if any, withheld or collected, and if collected at a time other than the time such payment was made, the date collected. If the total remuneration (paragraph (a)(2) of this section) and the amount which is subject to contribution (paragraph (a)(3) of this section) are not equal, the reason shall be stated.

The State shall keep copies of all returns, reports, schedules, and statements required by this subpart, copies of claims for refund or credit, and copies of documents about each adjustment made under § 404.1265 or § 404.1271 as part of its records. These records may be maintained by the State or, for employees of a political subdivision, by the political subdivision. Each State shall use forms and systems of accounting as will enable the Secretary to determine whether the contributions for which the State is liable are correctly figured and paid.

(b) *Place and period of time for keeping records.* All records required by this section shall:

(1) Be kept at one or more convenient and safe locations accessible to reviewing personnel (see § 404.1232(a));

(2) Be available for inspection by reviewing personnel at any time; and

(3) Be maintained for at least four years from the date of the event recorded. (This four-year requirement applies regardless of whether, in the meantime, the employing entity has been legally dissolved or, before April

20, 1983, the agreement was terminated in its entirety or in part.)

Review of Compliance By State With Its Agreement

§ 404.1230 Onsite review program.

To ensure that the services of employees covered by a State's agreement are reported and that those employees receive Social Security credit for their covered earnings, we periodically review the source records upon which a State's contribution returns and wage reports are based. These reviews are designed:

(a) To measure the effectiveness of the State's systems for ensuring that all wages for those employees covered by its agreement are reported and Social Security contributions on those wages are paid;

(b) To detect any misunderstanding of coverage or reporting errors and to advise the State of the corrective action it must take; and

(c) To find ways to improve a State's recordkeeping and reporting operations for the mutual benefit of the State and SSA.

§ 404.1231 Scope of review.

The onsite review focuses on four areas:

(a) State's controls and recordkeeping—to assess a State's systems for assuring timely receipt, correctness, and completeness of wage reports and contribution returns;

(b) Instruction, education, and guidance a State provides local reporting officials—to assess a State's systems for assuring on a continuing basis that all reporting officials and their staffs have the necessary instructions, guidelines, and training to meet the State's coverage, reporting and recordkeeping requirements;

(c) Compliance by reporting officials—to assess a State's systems for assuring that the reporting officials in the State have adequate recordkeeping procedures, are properly applying the appropriate provisions of the State's agreement, and are complying with reporting requirements; and

(d) Quality control with prompt corrective action—to assess a State's systems for assuring that its reports and those of its political subdivisions are correct, for identifying the causes and extent of any deficiencies, and for promptly correcting these deficiencies.

§ 404.1232 Conduct of review.

(a) Generally, SSA staff personnel conduct the onsite review. Occasionally, members of the Office of the Inspector General, Department of Health and Human Services (HHS), may conduct or participate in the review.

(b) The review is done when considered necessary by SSA or HHS or, if practicable, in response to a State's specific request for a review.

(c) All pertinent source records prepared by the State or its political subdivisions are reviewed, on site, to verify the wage reports and contribution returns. We may review with the appropriate employees in a subdivision those source records and how the information is gathered, processed, and maintained. We notify the State's Social Security Administrator when we plan to make the review and request her or him to make the necessary arrangements.

(d) The review is a cooperative effort between SSA and the States to improve the methods for reporting and maintaining wage data to carry out the provisions of the agreement.

§ 404.1234 Reports of review's findings.

We provide the State Social Security Administrator with reports of the review's findings. These reports may contain coverage questions which need development and resolution and reporting errors or omissions for the State to correct promptly. These reports may also recommend actions the State can take to improve its information gathering, recordkeeping, and wage reporting systems, and those of its political subdivisions.

How to Report Wages and Contributions—for Wages Paid Prior to 1987

§ 404.1237 Wage reports and contribution returns—general—for wages paid prior to 1987.

(a) *Wage reports.* Each State shall report each year the wages paid each covered employee during that year. With the wage report the State shall also identify, as prescribed by SSA, each political subdivision by its assigned identification number and, where appropriate, any coverage group or payroll record unit number assigned.

(b) *Wage reports of remuneration for agricultural labor.* A State may exclude from its agreement any services of employees the remuneration for which is not wages under section 209(h)(2) of the Act. Section 209(h)(2) excludes as wages the cash remuneration an employer pays employees for agricultural labor which is less than $150 in a calendar year, or, if the employee performs the agricultural labor for the employer on less than 20 days during a calendar year, the cash remuneration computed on a time basis. If a State does exclude the services and the individual meets the cash-pay or 20-day test described in § 404.1056, the State shall identify on the wage report and on any adjustment report each individual performing agricultural labor and the amount paid to her or him.

(c) *Contribution returns.* The State shall forward the contribution return as set out in § 404.1249(b). It shall make contribution payments under § 404.1262.

§ 404.1239 Wage reports for employees performing services in more than one coverage group—for wages paid prior to 1987.

(a) *Employee of State in more than one coverage group.* If a State employee is in more than one coverage group, the State shall report the employee's total wages, up to the annual wage limitations in § 404.1047, as though the wages were paid by only one of the coverage groups.

(b) *Employee of political subdivision in more than one coverage group.* If an employee of a political subdivision is in more than one coverage group, the State shall report the employee's total wages, up to the annual wage limitations in § 404.1047, as though the wages were paid by only one of the coverage groups.

(c) *Employee of State and one or more political subdivisions.* If an individual performs covered services as an employee of the State and an employee of one or more political subdivisions and the State agreement does not provide for limiting contributions under section 218(e)(2) of the Act as it read prior to the enactment of Pub. L. 99–509, the State and each political subdivision shall report the amount of covered wages it paid the employee up to the annual wage limitations in § 404.1047.

(d) *Employee of more than one political subdivision.* If an individual performs covered services as an employee of more than one political subdivision and the State agreement does not provide for limiting contributions under section 218(e)(2) of the Act as it read prior to the enactment of Pub. L. 99–509, each political subdivision shall report the covered wages it paid the employee up to the annual wage limitations in § 404.1047.

(e) *Employee performing covered services for more than one political entity where section 218(e)(2) of the Act is applicable.* If an agreement provides for limiting contributions under section 218(e)(2) of the Act as it read prior to the enactment of Pub. L. 99–509, the reporting officials compute the total amount of wages paid the employee by two or more political subdivisions of a State, or a State and one or more of its political subdivisions, which were subject to section 218(e)(2) of the Act. The State reports the amount of wages paid up to the annual wage limitations in § 404.1047. The employee is treated as having only one employer. If the employee also had wages not subject to section 218(e)(2) of the Act, the State shall report those wages separately.

§ 404.1242 Back pay.

(a) *"Back pay"* defined. Back pay is pay received in one period of time which would have been paid in a prior period of time except for a wrongful or improper action taken by an employer. It includes pay made under Federal or State laws intended to create an employment relationship (including situations where there is unlawful refusal to hire) or to protect an employee's right to wages.

(b) *Back pay under a statute.* Back pay under a statute is a payment by an employer following an award, determination or agreement approved or sanctioned by a court or administrative agency responsible for enforcing a Federal or State statute protecting an employee's right to employment or wages. Examples of these statutes are:

(1) National Labor Relations Act or a State labor relations act;

(2) Federal or State laws providing reemployment rights to veterans;

(3) State minimum wage laws; and

(4) Civil Rights Act of 1964.

Payments based on legislation comparable to and having a similar effect as those listed in this paragraph may also qualify as having been made under a statute. Back pay under a statute, excluding penalties, is wages if paid for covered employment. It is allocated to the periods of time in which it should have been paid if the employer had not violated the statute. For backpay awards affecting periods prior to 1987, a State must fill a wage report and pay the contributions due for all periods involved in the back pay award under the rules applicable to those periods.

(c) *Back pay not under a statute.* Where the employer and the employee agree on the amount payable without any award, determination or agreement approved or sanctioned by a court or administrative agency, the payment is not made under a statute. This back pay cannot be allocated to prior periods of time but must be reported by the employer for the period in which it is paid.

§ 404.1243 Use of reporting forms—for wages paid prior to 1987.

(a) *Submitting wage reports.* In the form and manner required by SSA, a State shall submit an annual report of the covered wages the State and its political subdivisions paid their employees. Any supplemental, adjustment, or correctional wage report filed is considered a part of the State's wage report.

(b) *Correction of errors.* If a State fails to report or incorrectly reports an employee's wages on its wage report, the State shall submit a corrective report as required by SSA.

(c) *Reporting on magnetic tape or other media.* After approval by SSA, a State may substitute magnetic tape or other media for any form required for submitting a report or reporting information.

§ 404.1247 When to report wages—for wages paid prior to 1987.

A State shall report wages for the calendar year in which they were actually paid. If the wages were constructively paid in a prior calendar year, the wages shall be reported for the prior year (see § 404.1042(b) regarding constructive payment of wages).

§ 404.1249 When and where to make deposits of contributions and to file contribution returns and wage reports—for wages paid prior to 1987.

(a) *Deposits of contributions.* The State shall pay contributions in the manner required in § 404.1262. (For failure to make deposits when due see § 404.1265.) The contribution payment is considered made when received by the appropriate Federal Reserve bank or branch (see § 404.1262). Except as provided in paragraphs (b) (2) and (3) and paragraph (c) of this section, contributions are due and payable as follows:

(1) *For wages paid before July 1, 1980.* Contribution payments for wages paid in a calendar quarter are due on the 15th day of the second month following the end of the calendar quarter during which the wages were paid.

(2) *For wages paid beginning July 1, 1980, and before January 1984.* Contribution payments for wages paid in a calendar month are due within the thirty day period following the last day of that month.

(3) *For wages paid after December 1983 and prior to 1987.* Contribution payments for wages paid in the first half of a calendar month are due on the last day of that month. Contribution payments for wages paid in the second half of that calendar month are due on the fifteenth day of the next month. (For purposes of this section, the first half of a calendar month is the first 15 days of that month and the second half is the remainder of that month.)

(b) *Contribution returns and wage reports*—(1) *Where to be filed.* The State shall file the original copies of all contribution returns, wage reports, and adjustment reports with the SSA.

(2) *When to be filed*—(i) *For years prior to execution of agreement or modification.* If an agreement or modification provides for the coverage of employees for periods prior to 1987, the State shall pay contributions due and shall file wage reports with SSA for these periods within 90 days after the date of the notice that the Secretary has signed the agreement or modification.

(ii) *For year of execution of agreement or modification.* If the agreement or modification provides for the coverage of employees for the year of execution of the agreement or modification, the State may, within 90 days after the date of the notice that the Secretary has signed the agreement or modification, submit a single contribution return and pay all contributions due for the following periods:

(A) The month in which the agreement or modification was signed;

(B) Any prior months in that year; and

(C) Any subsequent months before January 1984 (half-months after December 1983) whose contribution return and payment due date is within this 90 day period. The State shall file wage reports for that year by February 28 of the year following the date of execution or within 90 days of the date of the notice, whichever is later.

(iii) *For years after execution of agreement or modification.* Except as described in paragraph (b)(2)(ii) of this section, when the State pays its contributions under paragraph (a) of this section, it shall also file a contribution return. The State shall file the wage report for any calendar year after the year of execution of the agreement or modification by February 28 of the following calendar year.

(iv) For good cause shown, and upon written request by a State, the Secretary may allow additional time for filing the reports and paying the related contributions described in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(3) *Due date is on a weekend, legal holiday or Federal nonworkday.* If the last day for filing the wage report falls on a weekend, legal holiday or Federal nonworkday, the State may file the wage report on the next Federal workday. If the due date for paying contributions for the wages paid in a period (as specified in paragraph (a) of this section) falls on a weekend, legal holiday or Federal nonworkday, the State shall pay the contributions and shall file the contribution return no later than—

(i) The preceding Federal workday for wages paid in July 1980 through December 1983;

(ii) The next Federal workday for wages paid before July 1980 or after December 1983.

(4) *Submitting reports and payments.* When submitting the contribution returns or wage reports the State shall release them in time to reach SSA by the due date. When submitting contribution payments as described in § 404.1262, the State shall release the payments in time to reach the appropriate Federal Reserve bank or branch by the due date. In determining when to release any returns, reports, or payments the State shall provide sufficient time for them to timely reach their destination under the method of submission used, e.g., mail or electronic transfer of funds.

(c) *Payments by third party on account of sickness or accident disability.* Where a third party makes a payment to an employee on account of sickness or accident disability which constitutes wages for services covered under a State agreement, the wages will be considered, for purposes of the deposits required under this section, to have been paid to the employee on the date on which the employer receives notice from the third party of the amount of the payment. No interest will be assessed for failure to make a timely deposit of contributions due on such wages for which a deposit was made after December 1981 and before July 1982, to the extent that the failure to make the deposit timely is due to reasonable cause and not willful neglect.

§ 404.1251 Final reports—for wages paid prior to 1987.

If a political subdivision is legally dissolved, the State shall file a final report on that entity. The report shall include each coverage group whose existence ceases with that of the entity. It shall:

(a) Be marked "final report";

(b) Cover the period during which final payment of wages subject to the agreement is made; and

(c) Indicate the last date wages were paid.

With the final report, the State shall submit a statement showing the title and business address of the State official responsible for keeping the State's records and of each State and local official responsible for keeping the records for each coverage group whose existence is ended. The State shall also identify, as prescribed by SSA, each political subdivision by its assigned number and, where applicable, any coverage group or payroll record unit number assigned.

What Is a State's Liability for Contributions—for Wages Paid Prior to 1987

§ 404.1255 State's liability for contributions—for wages paid prior to 1987.

A State's liability for contributions equals the sum of the taxes which would be imposed by sections 3101 and 3111 of the Internal Revenue Code of 1954, if the services of the employees covered by the State's agreement were employment as defined in section 3121 of the Code. The State's liability begins when those covered services are performed, for which wages are actually or constructively paid to those individuals, includi[illegible]ages paid in a form other than c[illegible]ee § 404.1041(d)). If an agreement is effective retroactively, the State's liability for contributions on wages paid during the retroactive period begins with the date of execution of the agreement or applicable modification. Where coverage of a coverage group has been terminated, the State is liable for contributions on wages paid for covered services even if the wages are paid after the effective date of termination of coverage.

§ 404.1256 Limitation on State's liability for contributions for multiple employment situations—for wages paid prior to 1987.

(a) *Limitation due to multiple employment.* Where an individual in any calendar year performs covered services as an employee of a State and as an employee of one or more political subdivisions of the State, or as an employee of more than one political subdivision; and the State provides all the funds for payment of the amounts which are equivalent to the taxes imposed on the employer under FICA on that individual's remuneration for those services; and no political subdivision reimburses the State for paying those amounts; the State's agreement or modification of an agreement may provide that the State's liability for the contributions on that individual's remuneration shall be computed as though the individual had performed services in employment for only one political subdivision. The State may then total the individual's covered wages from all these governmental employers and compute the contributions based on that total subject to the wage limitations in § 404.1047.

(b) *Identification of employees in multiple employment.* An agreement or modification of an agreement providing for the computation of contributions as described in paragraph (a) of this
section shall identify the class
of employees to whose wages
method of computing contribut
applies. For example, the State
provide that such computation
apply to the wages paid to all
individuals for services perfor
positions covered by a particul
retirement system, or to the wa
to all individuals who are mem
any two or more coverage grou
designated in an agreement or
modification. The State shall p
notify SSA if the conditions in
paragraph (a) of this section ar
longer met by any class or clas
employees identified in an agr
modification. In its notification,
State shall identify each class
employees and the date on whi
conditions ceased to be met.

(c) *Effective date.* In the agre
modification, the State shall pr
that the computation of contrib
shall apply to wages paid after
effective date stated in the agre
modification. That date may be
day of any calendar year; how
may be no earlier than January
year in which the agreement or
modification is submitted to SS

Figuring the Amount of the Stat Contributions—for Wages Paid 1987

§ 404.1260 Amount of contributio wages paid prior to 1987.

The State's contributions are
the product of the applicable
contribution rate (which is equi
both the tax rates imposed unde
sections 3101 and 3111 of the In
Revenue Code) times the amou
wages actually or constructivel
for covered services each year
to the wage limitations in § 404.
the employee.

§ 404.1262 Manner of payment of contributions by State—for wages prior to 1987.

When paying its contributions
State shall deposit its payment a
specific Federal Reserve bank or
designated by SSA.

§ 404.1263 When fractional part o may be disregarded—for wages pa to 1987.

In paying contributions to a Fe
Reserve bank or branch, a State
disregard a fractional part of a c
unless it amounts to one-half cen
more, in which case it shall be in
to one cent. Fractional parts of a
shall be used in computing the to
contributions.

If a State Fails To Make Timely Payments—for Wages Paid Prior to 1987

§ 404.1265 Addition of interest to contributions—for wages paid prior to 1987.

(a) *Contributions not paid timely.* If a State fails to pay its contributions to the appropriate Federal Reserve bank or branch (see § 404.1262), when due under § 404.1249(a), we add interest on the unpaid amount of the contributions beginning with the date the payment was due, except as described in paragraphs (b) and (c) of this section. Interest, if charged, begins with the due date even if it is a weekend, legal holiday or Federal nonwork day. Interest is added at the rate prescribed in section 218(j) of the Act as it read prior to the enactment of Pub. L. 99–509.

(b) *Method of making adjustment.* (1) If a State shall file a contribution return and shall accompany such return with payment of contributions due and payable as reported on such return in accordance with § 404.1249 but the amount of the contributions reported and paid is less than the correct amount of contributions due and payable and the underpayment of contributions is attributable to an error in computing the contributions (other than an error in applying the rate of contributions in effect at the time the wages were paid), the State shall adjust the underpayment by reporting the additional amount due by reason of such underpayment either as an adjustment of total contributions due with the first wage report filed after notification of the underpayment by the Social Security Administration, or as a single adjustment of total contributions due with any contribution return filed prior to the filing of such wage report.

(2) If an underpayment of contributions is due to an underreporting of or a failure to report one or more employees:

(i) Where the underreporting or failure to report has been ascertained by the State, the State may cause an adjustment by filing a report within 30 days after ascertainment of the error by the State;

(ii) Where the underreporting or failure to report has been ascertained by the Social Security Administration, a notification of underpayment shall be forwarded to the State, and the State may cause an adjustment of the underpayment by returning to the Social Security Administration, within 30 days from the date of the notification, a copy of the notification of underpayment and the State's corrected report. The report shall show the amount of wages, if any, erroneously reported for the reporting period and the correct amount of wages that should have been reported and the identification number of the State or the political subdivision for each employee who was omitted or erroneously reported. The filing to correct an underreporting of or a failure to report one or more employees' wages shall not constitute an adjustment under this section unless the wages were erroneously omitted or erroneously reported.

(c) *Payment.* The amount of each underpayment adjusted in accordance with this section shall be paid to the Federal Reserve Bank, or branch thereof, serving the district in which the State is located, without interest, at the time of reporting the adjustment; except that where any amounts due with respect to such an adjustment had been paid in error to IRS and a refund thereof timely requested from, or instituted by, IRS, the amount of underpayment adjusted in accordance with this section, plus any interest paid by IRS on the amount of such underpayment, shall be paid to the Federal Reserve Bank, or branch thereof, serving the district in which the State is located, at the time of reporting the adjustment or within 30 days after the date of issuance by IRS of the refund of the erroneous payments, whichever is later. Except as provided in the preceding sentence of this paragraph, if an adjustment is reported pursuant to paragraph (b) of this section, but the amount thereof is not paid when due, interest thereafter accrues.

(d) *Verifying contributions paid against reported wages.* We check the computation of contributions to verify that a State has paid the correct amount of contributions on the wages it reports for a calendar year (see § 404.1249(b)(2)). If we determine that a State paid less than the amount of contributions due for that year, we add interest to the amount of the underpayment. We would add interest beginning with the date the unpaid contributions were initially due to the date those contributions are paid. However, if the total amount of the underpayment is 5 percent or less than 5 percent of the contributions due for a calendar year based upon the State's wage report and the State deposits the underpaid amount within 30 days after the date of our notification to the State of the amount due, the State may request that the interest on the underpaid amount be waived for good cause. This request must be made within 30 days of our notification to the State of the amount due. Such requests will be evaluated on an individual basis. The evaluation will include, but not be limited to, consideration of such factors as the circumstances causing the late payment, the State's past record of late payments and the amount involved.

Examples

(1) The records of a political subdivision for the month of June are destroyed by fire. The State makes an estimated deposit of contributions for the month of June for that political subdivision and deposits contributions for the month of June for all other political subdivisions based on actual records. At the time SSA verifies contributions paid against reported wages, we discover that the State has paid only 97 percent of its total liability for the year. Within 30 days after we notify it of the amount due, the State asks that we waive the interest on the unpaid amount and the State deposits the unpaid amount. In this situation, we would waive the interest on the unpaid contributions.

(2) We would waive interest if:

(i) Some of the political subdivisions made small arithmetical errors in preparing their reports of wages,

(ii) After verification of the contributions paid against reported wages, SSA discovers that minimal additional contributions are due,

(iii) Within 30 days of our notice to the State regarding this underpayment the State, which usually makes its deposits timely, pays the amount due, and

(iv) Within that same 30 day period the State requests that we waive the interest due.

(3) We would not waive interest where a State frequently has problems depositing its contributions timely. Reasons given for the delays are, e.g., the computer was down, the 5 p.m. mail pickup was missed, one of the school district reports was misplaced. If requested we would not waive interest on this State's late payment of contributions based upon its past record of late payments and because of the circumstances cited.

(e) *Due date is on a weekend, legal holiday or Federal nonworkday.* If the last day of the 30-day periods specified in paragraphs (b) and (d) of this section is on a weekend, legal holiday or Federal nonworkday, the State shall make the required deposit or request for waiver of payment of interest on the next Federal workday.

§ 404.1267 Failure to make timely payments—for wages paid prior to 1987.

If a State does not pay its contributions when due, the Secretary has the authority under section 218(j) of the Act as it read prior to the enactment of Pub. L. 99–509 to deduct the amounts of the unpaid contributions plus interest at the rate prescribed from any amounts certified by her or him to the Secretary of the Treasury for payments to the State under any other provision of the Social Security Act. The Secretary notifies the Secretary of the Treasury of the amounts deducted and requests that the amount be credited to the Trust Funds. Amounts deducted are considered paid to the State under the other provision of the Social Security Act.

How Errors in Reports and Contributions Are Adjusted—for Wages Paid Prior to 1987

§ 404.1270 Adjustments in general—for wages paid prior to 1987.

States have the opportunity to adjust errors in the payment of contributions. A State but not its political subdivisions is authorized to adjust errors in the underpayment of contributions. Similarly, the State shall file all claims for credits or refunds and SSA makes the credits and refunds only to the State. Generally, we do not refund contributions in cash to a State unless the State is not expected to have future liability for contributions under section 218 of the Act.

§ 404.1271 Adjustment of overpayment of contributions—for wages paid prior to 1987.

(a) *General.* If a State pays more than the correct amount of contributions, the State shall adjust the overpayment with the next contribution return filed on which the amount owed equals or exceeds the amount of the overpayment.

(b) *Overpayment due to overreporting of wages*—(1) *Report to file.* If the overpayment is due to the State's reporting more than the correct amount of wages paid to one or more employees during a reporting period and the overpayment is not adjusted under paragraph (a) of this section, the State shall file a report on the appropriate form showing:

(i) The corrected wage data as prescribed by SSA; and

(ii) The reason why the original reporting was incorrect.

(2) *Refund or credit of overpayment where section 218(e)(2) of the Act not applicable.* If:

(i) The State collected contributions from employees in excess of the amount of taxes that would have been required under section 3101 of the Internal Revenue Code; and

(ii) The State paid to the Secretary of the Treasury those contributions plus a matching amount in excess of the taxes which would have been required from an employer under section 3111 of the Code; and

(iii) The services of the employees in question would have constituted employment under section 3121(b) of the Code; and

(iv) Section 218(e)(2) of the Act as it read prior to the enactment of Pub. L. 99–509 does not apply (see § 404.1256(a)), then the State shall adjust the overpaid contributions under paragraph (b)(1) of this section. With its adjustment the State, where appropriate, shall include on the prescribed form a statement that the employees from whom the excess contributions were collected have not received nor expect to receive a refund of excess contributions under section 6413(c) of the Internal Revenue Code of 1954 (see § 404.1275(b)). Generally, if the State does not include this statement with its adjustment request, we only refund or credit the State for up to one-half of the overpaid amount.

(c) *Refund or credit of overpayment where section 218(e)(2) of the Act applicable.* (1) *General.* If—

(i) The overreporting of the amount of wages paid to one or more employees during a reporting period(s) is due to a computation of contributions under § 404.1256 for a year or years prior to the year in which the agreement or modification providing for the computation is entered into, or

(ii) The overreporting is due to a failure to compute § 404.1256,

the State shall adjust the overpayment under paragraph (b)(1) of this section. An overpayment due to overreported wages which does not result from the computation of contributions or a failure to compute contributions under § 404.1256 shall also be adjusted by the State under paragraph (b)(1) of this section. If the adjustment of the overpayment results in an underreporting of wages for any employee by the State or any political subdivision, the State shall include with the report adjusting the overpayment a report adjusting each underreporting. If the adjustment of the overpayment does not result in an underreporting of wages for any employee by the State or any political subdivision, the State shall include with the report adjusting the overpayment a statement that the adjustment of the overpayment does not result in any underreporting.

(2) *Amount of refund or credit.* If the State collects excess contributions from employees, the State's claim for refund or credit is limited to the overpaid amounts. (See § 404.1275 relating to adjustment of employee contributions.) If—

(i) The State collected the correct amount of contributions from employees based on the amount of wages reported and the Forms W–2 issued to the employees show only the amount of contributions actually collected, but the amount of wages reported is being adjusted downward, or

(ii) The State collects excess contributions from employees but Forms W–2 have not been issued for an amount of wages which is being adjusted downward, the State may claim a refund or credit for the overpaid amounts. Where the State's claim for refund or credit is for the total overpaid amount, the adjustment report shall include a statement that excess contributions have not been collected from employees, or, where excess contributions have been collected, that Forms W–2 have not been issued and that, when issued, they will show the correct amount of employee contributions.

§ 404.1272 Refund or recomputation of overpayments which are not adjustable—for wages paid prior to 1987.

(a) *General.* If a State pays more than the correct amount of contributions or interest to the appropriate Federal Reserve bank or branch (see § 404.1262), and no adjustment in the amount of reported wages is necessary, that State may file a claim for refund or recomputation of the overpayment.

(b) *Form of claim.* No special form is required to make a claim for a refund or recomputation. If a credit is taken under § 404.1271, a claim is not required.

(c) *Proof of representative capacity.* If a report or return is made by an authorized official of the State who ceases to act in an official capacity and a claim for a refund is made by a successor official, the successor official must submit with the claim written evidence showing that he or she has the authority to make a claim for and receive a refund of any contributions paid by the former official. The written evidence is not necessary if the successor official has previously filed one or more reports or returns which contain her or his signature and official title.

§ 404.1275 Adjustment of employee contributions—for wages paid prior to 1987.

The amount of contributions a State deducts from an employee's remuneration for covered services, or any correction of that amount, is a matter between the employee and the State or political subdivision. The State shall show any correction of an employee's contribution on statements it furnishes the employee under § 404.1226. Where the State issues an employee a Form W–2 and then submits an overpayment adjustment but claims less than the total overpaid amount as a refund or credit, the State shall not correct the previously issued Form W–2 to reflect that adjustment.

§ 404.1276 Reports and payments erroneously made to Internal Revenue Service-transfer of funds—for wages paid prior to 1987.

(a) *General.* In some instances, State or local governmental entities not covered under an agreement make reports and pay contributions to IRS under the Federal Insurance Contributions Act (FICA) procedures applicable to private employers in the mistaken belief that this provides Social Security coverage under section 218 of the Act for their employees. In other instances, entities which are covered under an agreement erroneously report to IRS, or a State or local government employee reports other employees to IRS or reports to IRS as a self-employed individual. Where these reports and payments are erroneously made to IRS, the State may correct the error and obtain coverage under its agreement as described in paragraphs (b) through (f) of this section.

(b) *Political subdivision not included in the State agreement.* We notify the State that if it desires coverage, it may be provided by either a regular modification or an error modification, depending on the circumstances (§§ 404.1215 and 404.1216). In most cases, the State may obtain coverage by a regular modification. If a regular modification cannot be used (e.g., State law does not permit the retroactive effective date which would be desired), the State may use an error modification. The effective date of either modification depends on the facts of the situation being corrected.

(c) *Political subdivision included in the agreement.* If a political subdivision included in the agreement erroneously makes reports and payments under FICA procedures, the State must correct the reportings for periods not barred by the statute of limitations. If the covered entity reported both under the agreement and under FICA procedures, we notify IRS and make necessary corrections in the earnings records. We also advise the State that the entity which reported under FICA procedures should request a refund of payments erroneously made to IRS.

(d) *State and local government employees erroneously reported as employees of individual or as self-employed.—(1) Covered entity.* If employees of a covered entity are erroneously reported as employees of an individual or as self-employed, we advise the State that the individual who made the reports should request a refund from IRS for periods not barred by the statute of limitations. We require the State to file correctional reports and returns for any periods open under the State and local statute of limitations.

(2) *Noncovered entity.* We advise the State that the individual who made the reports should request a refund from IRS for the periods not barred by the statute of limitations. If the State wishes to provide coverage, it must submit a modification as discussed in paragraph (b) of this section. If the State does not wish to provide coverage, we void the reports. Amounts reported for periods barred by the statute of limitations remain on the earnings records.

(e) *Filing wage reports and paying contributions.* Generally, the entity or individual that makes the erroneous reports and payments requests the refund from IRS for periods not barred by the statute of limitations. The State files the necessary reports with SSA and pays any contributions due. The reports shall conform to the coverage provided by the agreement to the extent permitted by the statute of limitations. The due date for these reports depends on whether original reports or adjustment reports are involved. Reports and contribution returns for the entire retroactive period of coverage provided by a regular or error modification are due 90 days after the date of execution of the modification. The time limitations for issuing assessments and credits or refunds extend from this due date. Thus, SSA may issue assessments or credits or refunds for periods barred to refund by IRS. The State may request that reports and payments for the IRS barred periods be considered made under the agreement as described in paragraph (f) of this section.

(f) *Use of transfer procedure.* In limited situations, the State may request that reports and payments the State or a political subdivision (but not an individual) erroneously made under FICA procedures and which have been posted to the employee's earnings record be considered made under the State's agreement. We use a transfer procedure to do this. The transfer procedure may be used only where

(1) The periods are open to assessment under the State and local statute of limitations;

(2) The erroneous reports to be transferred are posted to SSA's records;

(3) The periods are barred to refund under the IRS statute of limitations; and

(4) A refund is not obtained from IRS by the reporting entity.

How Overpayments of Contributions Are Credited or Refunded—for Wages Paid Prior to 1987

§ 404.1280 Allowance of credits or refunds—for wages paid prior to 1987.

If a State pays more than the amount of contributions due under an agreement, SSA may allow the State, subject to the time limitations in § 404.1282 and the exceptions to the time limitations in § 404.1283, a credit or refund of the overpayment.

§ 404.1281 Credits or refunds for periods of time during which no liability exists—for wages paid prior to 1987.

If a State pays contributions for any period of time for which contributions are not due, but the State is liable for contributions for another period, we credit the amount paid against the amount of contributions for which the State is liable. We refund any balance to the State.

§ 404.1282 Time limitations on credits or refunds—for wages paid prior to 1987.

(a) *General.* To get a credit or refund, a State must file a claim for a credit or refund of the overpaid amount with the Secretary before the applicable time limitation expires. The State's claim for credit or refund is considered filed with the Secretary when it is delivered or mailed to the Secretary. Where the time limitation ends on a weekend, legal holiday or Federal nonworkday, we consider a claim timely filed if it is filed on the next Federal workday.

(b) *Time limitation.* Subject to the exceptions in § 404.1283, a State must file a claim for credit or refund of an overpayment before the end of the latest of the following time periods:

(1) 3 years, 3 months, and 15 days after the year in which the wages in question were paid or alleged to have been paid; or

(2) 3 years after the due date of the payment which included the overpayment; or

(3) 2 years after the overpayment was made to the Secretary of the Treasury.

§ 404.1283 Exceptions to the time limitations on credits or refunds for wages paid prior to 1987.

(a) (1) *Extension by agreement.* The applicable time period described in § 404.1282 for filing a claim for credit for, or refund of, an overpayment may, before the expiration of such period, be extended for no more than 6 months by written agreement between the State and the Secretary. The agreement must involve and identify a known issue or reporting error. It must also identify the periods involved, the time limitation which is being extended and the date to which it is being extended, and the coverage group(s) and position(s) or individual(s) to which the agreement applies. The extension of the period of limitation shall not become effective until the agreement is signed by the appropriate State official and the Secretary. (See § 404.3(c) for the applicable rule where periods of limitation expire on nonwork days.) A claim for credit or refund filed by the State before the extended time limit ends shall be considered to have been filed within the time period limitation specified in section 218(r)(1) of the Act as it read prior to the enactment of Pub. L. 99-509. (See § 404.1282.)

(2) *Reextension.* An extension agreement provided for in paragraph (a)(1) of this section may be reextended by written agreement between the State and the Secretary for no more than 6 months at a time beyond the expiration of the prior extension or reextension agreement, and only if one of the following conditions is met:

(i) Litigation (including intrastate litigation) or a review under §§ 404.1290 or 404.1297 involving wage reports or corrections on the same issue is pending; or

(ii) The State is actively pursuing corrections of a known error which require additional time to complete; or

(iii) The Social Security Administration is developing a coverage or wage issue which was being considered before the statute of limitations expired and additional time is needed to make a determination; or

(iv) The Social Security Administration has not issued to the State a final audit statement on the State's wage or correction reports; or

(v) There is pending Federal legislation which may substantially affect the issue in question, or the issue has national implications.

(b) *Deletion of wage entry on employee's earnings record.* If the Secretary, under section 205(c)(5) (A), (B), or (E) of the Act, deletes a wage entry on an individual's earnings record, a claim for credit or refund of the overpayment resulting from the deletion is considered filed within the applicable time limitations in § 404.1282 if

(1) The State files the claim before the Secretary's decision regarding the deletion of the wage entry from the individual's earnings record becomes final or

(2) The State files a claim regarding the deletion of the wage entry from the individual's earnings record which entry is erroneous because of fraud.

§ 404.1284 Offsetting underpayments against overpayments—for wages paid prior to 1987.

(a) *State fails to make adjustment for allowance of credit.* If SSA notifies a State that a credit is due the State, and the State does not make the adjustment for the allowance of the credit, SSA offsets the credit against any contributions or interest due. Before making the offset, SSA will give the State an opportunity to make the adjustment.

(b) *State fails to make adjustment for underpayment of contributions or interest due.* If SSA notifies a State that contributions or interest are due, and the State does not pay the contributions or interest, SSA offsets the contributions or interest due against any credit due the State. Before making the offset, SSA will give the State an opportunity to pay the underpayment or interest due.

How Assessments for Underpayments of Contributions Are Made—for Wages Paid Prior to 1987

§ 404.1285 Assessments of amounts due—for wages paid prior to 1987.

(a) A State is liable for any amount due (which includes contributions or interest) under an agreement until the Secretary is satisfied that the amount has been paid to the Secretary of the Treasury. If the Secretary is not satisfied that a State has paid the amount due, the Secretary issues an assessment for the amount due subject to the time limitations in § 404.1286 and the exceptions to the time limitations in §§ 404.1287 and 404.1289. If detailed wage information is not available, the assessment is issued based on the following:

(1) The largest number of individuals whose services are known to be covered under the agreement is used for computation purposes;

(2) The individuals are assumed to have maximum creditable earnings each year;

(3) The earnings are considered wages for covered services; and

(4) The amount computed is increased by twenty percent to insure that all covered wages are included in the assessment.

(b) If the State pays the amount assessed and the assessed amount is later determined to be more than the amount actually due, we issue a refund or credit to that State for the excess amount. When the assessment is issued within the applicable time limitation, there is no time limit on collecting the amount due. An assessment is issued on the date that it is mailed or otherwise delivered to the State.

§ 404.1286 Time limitations on assessments—for wages paid prior to 1987.

(a) Subject to the exceptions to the time limitations in §§ 404.1287 and 404.1289, a State is not liable for an amount due under an agreement unless the Secretary makes an assessment for that amount before the later of the following periods ends:

(1) Three years, 3 months, and 15 days after the year in which the wages, upon which the amount is due, were paid; or

(2) Three years after the date the amount became due.

(b) Where the time limitation ends on a weekend, legal holiday or Federal nonworkday, an assessment is considered timely if the Secretary makes the assessment on the next Federal workday.

§ 404.1287 Exceptions to the time limitations on assessments—for wages paid prior to 1987.

(a)(1) *Extension by agreement.* The applicable time period described in § 404.1286 for assessment of an amount due may, before the expiration of such period, be extended for no more than 6 months by written agreement between the State and the Secretary. The agreement must involve and identify a known issue or reporting error. It must also identify the periods involved, the time limitation which is being extended and the date to which it is being extended, and the coverage group(s) and position(s) or individual(s) to which the agreement applies. The extension of the period of limitation shall not become effective until the agreement is signed by the appropriate State official and the Secretary. (See § 404.3(c) for the applicable rule where periods of limitation expire on nonwork days.) An assessment made by the Secretary before the extended time limit ends shall be considered to have been made within the time period limitation specified in section 218(q)(2) of the Act as it read prior to the enactment of Pub. L. 99-509. (See § 404.1286.)

(2) *Reextension.* An extension agreement provided for in paragraph (a)(1) of this section may be reextended by written agreement between the State and the Secretary for no more than 6 months at a time beyond the expiration of the prior extension or reextension agreement, and only if one of the following conditions is met:

(i) Litigation (including intrastate litigation) or a review under § 404.1290 or § 404.1297 involving wage reports or corrections on the same issue is pending; or

(ii) The State is actively pursuing corrections of a known error which require additional time to complete; or

(iii) The Social Security Administration is developing a coverage or wage issue which was being considered before the statute of limitations expired and additional time is needed to make a determination; or

(iv) The Social Security Administration has not issued to the State a final audit statement on the State's wage or correction reports; or

(v) There is pending Federal legislation which may substantially affect the issue in question, or the issue has national implications.

(b) *The 365-day period.* If a State files a report before the applicable time limitation in § 404.1286 (or any extension under paragraph (a) of this section) ends and makes no payment or pays less than the correct amount due, the Secretary may assess the State for the amount due after the applicable time limitation has ended. However, the Secretary must make the assessment no later than the 365th day after the day the State makes payment to the Secretary of the Treasury. The Secretary can only make this assessment on the wages paid to the reported individuals for the reported periods. The Secretary, in making this assessment, credits the amount paid by the State on these individuals' wages for those reported periods.

(c) *Revision of employee's earnings record.* If, under section 205(c)(5) (A) or (B) of the Act, the Secretary credits wages to an individual's earnings record, the Secretary may make an assessment for any amount due on those wages before the Secretary's decision on revising the individual's earnings record becomes final. (Section 404.822(c) (1) and (2) describe the time limits for revising an earnings record where an individual has applied for monthly benefits or a lump-sum death payment or requested that we correct his earnings record.)

(d) *Overpayment of contributions on wages of employee having other wages in a period barred to assessment.* If the Secretary allows a State a credit or refund of an overpayment for wages paid or alleged to have been paid an individual in a calendar year but the facts upon which the allowance is based establish that contributions are due on other wages paid that individual in that year which are barred to assessment, we may make an assessment notwithstanding the periods of limitation in § 404.1286. The assessment, however, must be made before or at the time we notify the State of the allowance of the credit or refund. In this situation, the Secretary reduces the amount of the State's credit or refund by the assessed amount and notifies the State accordingly. For purposes of this paragraph, the assessment shall only include contributions and not interest as provided for in section 218(j) of the Act as it read prior to the enactment of Pub. L. 99–509.

Example: The State files an adjustment report timely to correct an error in the amount reported as wages for an employee. The correction reduces the employee's wages for the year to less than the maximum amount creditable. The employee has other earnings in the same year which were not reported because of the previously reported maximum amounts. The applicable time limitation for assessing contributions on wages for the year has expired before the credit was allowed. The Secretary may assess for the underpaid contributions but no later than thd date of the notice to the State that its claim for a credit had been allowed.

(e) *Evasion of payment.* The Secretary may make an assessment of an amount due at any time where the State's failure to pay the amount due results from the fraudulent attempt of an officer or employee of the State or political subdivision to defeat or evade payment of that amount.

§ 404.1289 Payment after expiration of time limitation for assessment—for wages paid prior to 1987.

The Secretary accepts wage reports filed by a State even though the applicable time limitation described in § 404.1286 (or as the time limitation is extended under § 404.1287) has expired, provided:

(a) The State pays to the Secretary of the Treasury the amount due on the wages paid to employees performing services in the coverage group in the calendar years for which the wage reports are being made; and

(b) The State agrees in writing with the Secretary to extend the time limitation for all employees in the coverage group in the calendar years for which the wage reports are being made.

In this situation, the time period for assessment is extended until the Secretary notifies the State that the wage reports are accepted. Where the State pays the amount due within the time period as extended under this section, the amount shall not include interest as provided for in section 218(j) of the Act as it read prior to the enactment of Pub. L. 99–509.

Secretary's Review of Decisions on Credits, Refunds, or Assessments—for Wages Paid Prior to 1987

§ 404.1290 Review of decisions by the Secretary—for wages paid prior to 1987.

(a) *Delegation of authority.* The Secretary, who has the authority under section 218(s) of the Act as it read prior to the enactment of Pub. L. 99–509 to review decisions on credits, refunds or assessments, has delegated this authority to the Commissioner of Social Security.

(b) *What decisions will be reviewed.* A State, under section 218(s) of the Act as it read prior to the enactment of Pub. L. 99–509, may request review of an assessment of an amount due from the State, an allowance to the State of a credit or refund of an overpayment, or a disallowance of the State's claim for credit or refund of an overpayment. The Commissioner may review regardless of whether the amount assessed has been paid or whether the credit or refund has been accepted by the State. Prior to the Commissioner's review, however, an assessment, allowance or disallowance may be reconsidered under §§ 404.1291 through 404.1293.

§ 404.1291 Reconsideration—for wages paid prior to 1987.

After the State requests review of the assessment or allowance or disallowance of a credit or refund, and prior to the Commissioner's review, that decision may be reconsidered, and affirmed, modified, or reversed. We notify the State of the reconsidered determination and the basis for it. The State may request the Commissioner to review this reconsidered determination under § 404.1294(b). In limited situations, SSA and the State may agree that the reconsideration process should be waived, e.g., where major policy is at issue.

§ 404.1292 How to request review—for wages paid prior to 1987.

(a) *Form of request.* No particular form of request is required. However, a written request for review must:

(1) Identify the assessment, allowance or disallowance being questioned;

(2) Describe the specific issue on which the review is requested;

(3) Contain any additional information or argument relevant to that issue; and

(4) Be signed by an official authorized to request the review on behalf of the State.

(b) *Submitting additional material.* A State has 90 days from the date it requests review to submit additional evidence it wishes considered during the review process. The time limit for submitting additional evidence may be extended upon written request of the State and for good cause shown.

§ 404.1293 Time for filing request for review—for wages paid prior to 1987.

(a) *Time for filing.* The State must file its request for review within 90 days after the date of the notice of assessment, allowance, or disallowance. Usually, the date of the request for review is considered the filing date. Where the 90-day period ends on a weekend, legal holiday or Federal nonworkday, a request filed on the next Federal workday is considered as timely filed.

(b) *Extension of time.* For good cause shown, and upon written application by a State filed prior to the expiration of the time for filing a request for review, additional time for filing the request may be allowed.

§ 404.1294 Notification to State after reconsideration—for wages paid prior to 1987.

(a) The State will be notified in writing of the reconsidered determination on the assessment, allowance, or disallowance, and the basis for the determination.

(b) If the State does not agree with the reconsidered determination, it has 90 days from the date of notice of the reconsidered determination to request the Commissioner to review that determination. The rules on what the request should contain and the time for filing the request are the same as in §§ 404.1292 and 404.1293.

§ 404.1295 Commissioner's review—for wages paid prior to 1987.

Upon request by the State, the Commissioner will review the reconsidered determination (or the assessment, allowance or disallowance as initially issued if reconsideration is waived under § 404.1291). If necessary, the Commissioner may request the State to furnish additional evidence. Based upon the evidence considered in connection with the assessment, allowance or disallowance and any additional evidence submitted by the State or otherwise obtained by the Commissioner, the Commissioner affirms, modifies, or reverses the assessment, allowance or disallowance.

§ 404.1296 Commissioner's notification to the State—for wages paid prior to 1987.

The Commissioner notifies the State in writing of the decision on the assessment, allowance, or disallowance, and the basis for the decision.

How a State May Seek Court Review of Secretary's Decision—for Wages Paid Prior to 1987

§ 404.1297 Review by court—for wages paid prior to 1987.

(a) *Who can file civil action in court.* A State may file a civil action under section 218(t) of the Act as it read prior to the enactment of Pub. L. 99–509 requesting a district court of the United States to review any decision the Commissioner makes for the Secretary under section 218(s) of the Act as it read prior to the enactment of Pub. L. 99–509 concerning the assessment of an amount due, the allowance of a credit or refund, or the disallowance of a claim for credit or refund.

(b) *Where the civil action must be filed.* A State must file the civil action in the district court of the United States for the judicial district in which the State's capital is located. If the civil action is brought by an interstate instrumentality, it must file the civil action in the district court of the United States for the judicial district in which the instrumentality's principal office is located. The district court's judgment is final except that it is subject to review in the same manner as judgments of the court in other civil actions.

(c) *No interest on credit or refund of overpayment.* SSA has no authority to pay interest to a State after final judgment of a court involving a credit or refund of an overpayment made under section 218 of the Act.

§ 404.1298 Time for filing civil action—for wages paid prior to 1987.

(a) *Time for filing.* The State must file the civil action for a redetermination of the correctness of the assessment, allowance or disallowance within 2 years from the date the Commissioner mails to the State the notice of the decision under § 404.1296. Where the 2-year period ends on a Saturday, Sunday, legal holiday or Federal nonwork day, an action filed on the next Federal workday is considered timely filed.

(b) *Extension of time for filing.* The Commissioner, for good cause shown, may upon written application by a State filed prior to the end of the two-year period, extend the time for filing the civil action.

§ 404.1299 Final judgments—for wages paid prior to 1987.

(a) *Overpayments.* Payment of amounts due to a State required as the result of a final judgment of the court shall be adjusted under §§ 404.1271 and 404.1272.

(b) *Underpayments.* Wage reports and contribution returns required as the result of a final judgment of the court shall be filed under §§ 404.1237–404.1251. We will assess interest under § 404.1265 where, based upon a final judgment of the court, contributions are due from a State because the amount of contributions assessed was not paid by the State or the State had used an allowance of a credit or refund of an overpayment.

[FR Doc. 88-19468 Filed 8-26-88; 8:45 am]

BILLING CODE 4190-11-M

32993

federal register

Monday
August 29, 1988

Part III

Department of Transportation

Urban Mass Transportation Administration

49 CFR Part 661

Buy America Requirements—Amendments; Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration

49 CFR Part 661

[Docket No. 88-G]
RIN 2132-AA15

Buy America Requirements—Amendments

AGENCY: Urban Mass Transportation Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking is issued by the Urban Mass Transportation Administration (UMTA) to implement section 337 of the Surface Transportation And Uniform Relocation Assistance Act of 1987. Section 337 amends UMTA's "Buy America" domestic preference provision (section 165 of the Surface Transportation Assistance Act of 1982). The purpose of this document is to seek comments on the amendments to the existing "Buy America" regulation that UMTA is proposing to implement these statutory changes, and on other amendments that UMTA is proposing based on experience in implementing the existing regulation.

DATE: Comments should be received by October 28, 1988.

ADDRESS: Comments should be addressed to: Department of Transportation, Urban Mass Transportation Administration, Office of the Chief Counsel, Docket No. 88-G, 400 Seventh Street SW., Room 9316, Washington, DC 20590. Comments will be available for review by the public at this address from 9:00 a.m. through 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Edward J. Gill, Jr., Deputy Chief Counsel, Office of the Chief Counsel, Room 9316, UMTA, 400 Seventh Street SW., Washington, DC 20590, (202) 366-4063.

SUPPLEMENTARY INFORMATION:

I. Discussion

A. Background

The Surface Transportation Assistance Act of 1978 included a Buy America provision applicable to the UMTA program. That provision was not an absolute prohibition against the procurement of foreign products, rather it established a preference for products mined, produced or manufactured in the United States, and applied to all contracts or UMTA grantees over $500,000.

Section 165 of the Surface Transportation Assistance Act of 1982 (section 165) made significant changes to the Buy America requirements by eliminating the $500,000 threshold for applicability and setting up essentially two separate programs. One governed the procurement of steel and manufactured products, and the other governed the procurement of rolling stock and certain kinds of enumerated associated equipment such as traction power, train control, and communications equipment.

Section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) made further changes to the Buy America requirements by amending section 165. The principal change was to require that more than 50 percent of the cost of a component's subcomponents (for buses and other rolling stock) be of U.S. origin in order for the component itself to be considered to be of U.S. origin. In addition, the domestic content requirement for buses, rolling stock and associated equipment will be increased from 50 to 55 percent effective October 1, 1989, and to 60 percent effective October 1, 1991, except that any company that has met the existing Buy America requirement would be exempted from these increases for all contracts entered into before April 1, 1992. Finally, the rolling stock price differential waiver was increased from 10 percent to 25 percent.

In addition to proposing to amend the "Buy America" regulation to implement these statutory changes, UMTA is also proposing a number of amendments to the existing regulation which reflect UMTA's experience in enforcing and interpreting the existing regulation since its issuance in 1983. Comments are specifically sought on both the proposed amendments implementing the new statutory provisions and on the proposed amendments to the existing regulation.

B. Implementation of Section 337 of the STURAA

1. Increase in Domestic Content

As indicated above, section 337 provides for a gradual increase of the domestic content requirement for rolling stock and associated equipment. UMTA is proposing to revise § 661.11 to reflect the increase in domestic content. Section 337(a)(2)(B) provides that the revised requirements shall not apply to any contract entered into prior to April 1, 1992, with "any supplier or contractor or any successor in interest or assignee which qualified under the provision of section 165(b)(3) of the Surface transportation Assistance Act of 1982 prior to [April 2, 1987]." UMTA specifically seeks comments on how it should define a "successor in interest or assignee" and how it should determine whether a supplier or contractor qualified under the provision of section 165(b)(3). It is UMTA's position that a company which complied with the domestic content requirements of section 165(b)(3) by supplying rolling stock or equipment to an entity that utilized UMTA funding for the procurement would be considered a "grandfathered" company under section 337(a)(2)(B). UMTA specifically seeks comments on whether a company which provided rolling stock which complied with the requirements of section 401 of the Surface Transportation Assistance Act of 1978 and its implementing regulations at 49 CFR part 660, but which did not provide rolling stock which complied with the requirements in section 165(b)(3) or did not provide any rolling stock since the enactment of section 165(b)(3) should be treated as a "grandfathered" company under section 337(a)(2)(B).

2. Price Differential Waiver

Section 317(c) of the STURAA amends section 165(b)(4) by eliminating the 10 percent price differential waiver that applied to the procurement of rolling stock and associated equipment and expanding the existing 25 percent price differential waiver that has applied to the procurement of steel and manufactured products to all procurements. Accordingly, UMTA is proposing to amended § 661.7(d) to reflect this statutory change. In addition, UMTA is proposing other changes to § 661.7(d) which are discussed below.

3. Procurement of Rolling Stock

Basic Requirements. Before discussing the implementation of the statutory change set forth in section 337(b) which expands the domestic content requirements relative to the procurement of rolling stock and associated equipment to include "subcomponents", it is important to set forth UMTA's position relative to the "manufacture" of components, and the "final assembly" of the "end product".

Prior to the STURAA, section 165(b)(3) provided, in essence, that in the procurement of rolling stock, the rolling stock would be considered to be of domestic origin and in compliance with the "Buy America" requirements if "the cost of components (of the rolling stock) which are produced in the United States is more than 50 per centum of the cost of all components of the vehicle * * * and final assembly of the vehicle

* * * has taken place in the United States."

UMTA's existing regulations define a component as "any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location" (49 CFR 661.11(b)). Final assembly is defined as being "the effort expended at the final assembly point to manufacture the end-product" (49 CFR 661.11(f)).

The key question in determining whether a supplier is complying with the "50 percent component" test is one of determining the identification of the "components." In order to determine if the regulatory definition of "component" has been met, UMTA must first make a determination as to what constitutes the "final assembly location" and then look to what is "directly incorporated into the end-product at the final assembly location" (49 CFR 661.11(b)). The existing regulation does not contemplate a single building or facility being the "final assembly location" or "final assembly point." (see discussion below concerning proposed revision to the existing regulation).

Origin of Components and Subcomponents. As noted above, section 337(b) of STURAA expands the domestic content requirements relative to the procurement of rolling stock and associated equipment to include "subcomponents." UMTA's review of the Joint Explanatory Statement of the Committee of Conference which accompanied the enactment of STURAA in House Report 100–27 (the Conference Report) indicates that Congress intended that a "component" is to be considered a "domestic" item if more than 50 percent of the "subcomponents" of the component, by cost, are of domestic origin and if the manufacture of the component takes place in the United States. It is UMTA's position that if a "component" meets this test, and is determined to be "domestic", the entire cost of the component is counted as being of U.S. origin in evaluating the cost of the "components" of the "end product." It is UMTA's position that a "subcomponent" is considered "domestic" if it is manufactured in the United States. There is nothing in section 337 or in the Conference Report to indicate that Congress intended that UMTA look to the origin of the parts of the "subcomponents." To carry the statutory language to its logical extension, the origin of "sub-sub-components" is immaterial in determining whether a "subcomponent" is manufactured in the United States.

The Conference Report indicates that "[b]y including the terms subcomponents, the conferees intend that major components, systems, or assemblies of buses and rail rolling stock be counted towards meeting the Buy America domestic content standard if the components, systems, or assemblies themselves would meet the domestic content requirement." The Conference Report also includes language that provides that "[i]n the case of both rail cars and buses, the conferees intend to cover only subcomponents that are one step removed from the major components, systems or assemblies, such as those listed [elsewhere in the Statement], and which are clearly recognized as primary subcomponents in the industry." UMTA specifically seeks comments of whether the regulation should provide that the origin of "sub-sub-components" should be examined in calculating domestic content.

The Conference report states that "[m]ajor components, systems, or assemblies of buses include, but are not limited to, items such as engines, transmissions, front axle assemblies, rear axle assemblies, drive shaft assemblies, front suspension assemblies, rear suspension assemblies, air compressor and pneumatic systems, generator/alternator and electrical systems, steering system assemblies, front and rear air brake assemblies, air conditioning compressor assemblies, air conditioninig evaporator/condenser assemblies, heating systems, passenger seats, driver's seat assemblies, window assemblies, entrance and exit door assemblies, door control systems, destination sign assemblies, interior lighting assemblies, front and rear end cap assemblies, front and rear bumper assemblies, specialty steel (structural steel tubing, etc.), aluminum extrusions, aluminum, steel or fiberglass exterior panels, and interior trim, flooring, and floor coverings."

The Conference Report also states that "[m]ajor components, systems, or assemblies of rail rolling stock include, but are not limited to, items such as car shells, main transformer, pantographs, traction motors, propulsion gear boxes, interior linings, acceleration and braking resistors, propulsion controls, low voltage auxiliary power supplies, air conditioning equipment, air brake compressors, brake controls, foundation brake equipment, aritculation assemblies, train control systems, window assemblies, communication equipment, lighting, seating, doors, door actuators and controls, couplers and draft gear, trucks, journal bearings, axles, diagnostic equipment, and third rail pick-up equipment."

In drafting the proposed regulation, UMTA has developed very general language concerning identification of subcomponents. This language follows on UMTA's previous general language concerning the definition of components, and reflects the Conference Report language cited above that the conferees only intend to cover subcomponents that are one step removed from the major components. UMTA specifically seeks comments on its proposed requirements concerning subcomponents, and on whether the listings from the Conference Report quoted above should be included, *in toto,* in the regulation. In addition, UMTA specifically seeks comments on whether the domestic content requirements should only be applied to *major* components as contained in the two quoted lists, or should continue to be applied to all components of end products as currently required in the regulation.

Export of Domestic Subcomponents. There are a number of issues that have been raised with UMTA relative to the treatment of exported domestic "subcomponents" and none of these issues are specifically addressed in section 337(b) nor by UMTA's general position discussed in the preceding paragraph.

Section 337(b) does not specifically address the treatment of "subcomponents" which are of U.S. origin, exported and manufactured into a component. However, the Conference Report indicates that "[t]he conferees * * * intend that American subcomponents incorporated into foreign components should be counted towards meeting the domestic content requirement." Therefore, UMTA is faced with determining how to account for the cost or value of a subcomponent manufactured in the United States which is incorporated into a component outside the United States.

UMTA is proposing to permit U.S. origin subcomponents that receive tariff exemptions to retain their domestic identity for purposes of determining origin if they met an existing United States Customs Service procedure. This procedure implements a legislative exemption from customs duties for those items produced in the United States which are: (1) Exported in condition ready for assembly without further fabrication; (2) have not lost their physical identity by change in form, shape, or otherwise; and (3) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

This proposal is a dramatic change from UMTA's existing procedures in that previously any U.S. content of a foreign component would not have been included in any calculation of domestic content requirements. It is important to note that this proposal would only have an impact on end products that receive final assembly in the United States. End products which do not receive final assembly in the United States are not domestic for purposes of the Buy America requirements, and the origin of their components and subcomponents is actually immaterial.

When UMTA issued regulations to implement section 165 of the STAA (48 FR 41564, September 15, 1983), it proposed the same procedure discussed above. Although UMTA did not implement this proposal as a final rule, it is again proposing to do so in connection with the implementation of section 337.

The duty imposed on such manufactured articles is computed by subtracting the cost or value of the United States products from the duty that is applicable to the full value of the imported articles. The Customs Service regulations implementing this procedure are set out at 19 CFR 10.11 through 10.24. An importer who desires to take advantage of this exception files documentation identifying the United States components in the assembled product. Thus, in incorporating this procedure, UMTA will not be imposing any additional paperwork requirements on suppliers.

Under this proposal, United States subcomponents that receive tariff exemptions would retain their domestic identity for purposes of determining the domestic content of both components and end products. The cost of subcomponents that receive tariff exemption would be included in the computation of domestic content regardless of whether the component itself would be considered domestic. For example, if a subcomponent that receives tariff exemption is 20% of the value of the entire component and the remaining 80% of the value of the entire component is of foreign origin, this 20% can be included in calculating the domestic content of the end product while the 80% foreign content would continue to be considered foreign content for the overall end product.

It is UMTA's position that materials produced in the United States cannot be counted a U.S. content if they have lost their physical identity during a manufacturing process which takes place outside of the United States. It is also UMTA's position that such materials are *not* "subcomponents" for purposes of applying the "Buy America" requirements. This case can be distinguished from the discussion of the "subcomponents" above wherein those "subcomponents" do not undergo further machining after they are exported, but are merely subject to the assembly process necessary to "manufacture" the component. Similarly, it is UMTA's position that raw material, such as aluminum or steel, that is produced in the United States and then exported for incorporation into a component cannot be counted as U.S. content.

Components With Less Than Fifty Percent U.S. Content. UMTA is also proposing to amend the regulations to provide that if a component which is manufactured in the United States contains less than 50 percent domestic subcomponents, by cost, the cost of the domestic subcomponents plus the cost of manufacturing the component in the United States may be included in the calculation of the domestic content of the end product.

C. Proposed Revisions to Existing Regulation

1. General

The authority citation for Part 661 is being revised to include the Surface Transportation and Uniform Relocation Assistance Act of 1987.

Section 661.1 of the existing regulations is proposed to be amended to simplify the explanation of the applicability of the regulations set forth in Part 661. Specifically the reference to programs administered by the Federal Highway Administration is being deleted because the program is now administered by UMTA; and paragraphs (b) and (c) of the existing regulations are being deleted because they were transition provisions for the implementation of section 165 of the STAA which are no longer necessary.

The definition of "overall project contract" is being deleted because UMTA has found the concept to be confusing to grantees. References to the term "overall project contract" in the text of the regulation have all been changed to spell out the actual contractual relationship being referred to.

2. Manufactured Products

Section 165(a) provides, in essence, that no Federal funds may be used in a procurement unless all manufactured products purchased through that procurement are of United States origin. The existing regulations, at § 661.3(d), define a "manufactured product" as a "product produced as a result of [a] manufacturing process." "Manufacturing process" is defined at § 661.3(e) as "a process whereby an original material is changed or transformed into an article which, because of the process, is different from the original product." It is UMTA's position that in order for a "manufactured product" to comply with the "Buy America" requirements, the product must be produced in the United States from original items or material originating in the United States. In other words, an item is "produced in the United States" if all of the manufacturing processes for the item take place in the United States, and the "components" of that item are *all* of U.S. origin. The existing regulations do not set forth any specific requirements concerning "manufactured products." Accordingly, UMTA is proposing to amend § 661.5 to reflect its position concerning what is required in order for a "manufactured product" to be considered of U.S. origin. The existing definitions of "manufactured product" and "manufacturing process" will remain.

3. Waivers to Statutory Requirements

Section 661.7 of the existing regulation provides procedures for obtaining exceptions to the general requirements set forth in section 165(a) of the STAA. The words "exception" and "waiver" have the same meaning for the purposes of this section, and UMTA is revising the regulation to use the term "waiver" throughout in order to avoid confusion.

Non-Availability Waiver. The existing regulations concerning the non-availability waiver under section 165(b)(2) of the STAA is written in terms of a bid or bids actually being received by a grantee. It is also possible that the grounds for a non-availability waiver can exist if there is a sole source procurement. UMTA is proposing to revise § 661.7(c) to reflect that a non-availability waiver can be granted in the case of a sole source procurement if the grantee provides UMTA with sufficient information to show that the grounds for the waiver exist. In this regard, UMTA has determined that the procurement of an item from an original supplier is not, in and of itself, sufficient grounds to grant a non-availability waiver. UMTA has encouraged grantees to enter into free and open competition to obtain such items. UMTA has been requested to grant a number of such waivers in the case of the procurement of replacement parts for rolling stock within the original part was a component of foreign origin supplied by the original vehicle manufacturer.

Price Differential Waiver. UMTA has received a number of questions concerning the mechanics of applying the provisions of section 165(b)(4) to a bid when multiple items are being procured under one contract. Section 165(b)(4), as amended, provides that a waiver can be granted if "inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent." The existing regulation, both in § 661.7 and in the definitions in § 661.3., utilize the term "overall project contract."

It is UMTA's position that the price differential must be applied independently to each individual item even if there is a single contract for all of these items. The bid for each non-domestic item must be adjusted by the differential and then the adjusted bid price for the foreign item compared to the lowest responsive and responsible bid for a domestic item to determine if the grounds for a waiver exist. Accordingly, UMTA is proposing to amend § 661.7(d) to reflect this position, and to clarify that the price differential is not be applied to the overall contract between the grantee and its supplier but to the comparative costs of each individual item being supplied.

UMTA believes that such a position is consistent with the statutory terms because the inclusion of domestic material in the overall project contract is still considered before a waiver is granted. The proposed amendment to the regulations will only directly affect the determination of adjusted bid price in the case of a single contract for multiple items, whereas a single contract for a single item will not be affected by the proposed amendment. UMTA seeks comments on this proposed amendment.

Waivers for Components. Section 661.7(f) of the existing regulations provides that a public interest or a non-availability waiver can be granted for a "component" as that term is defined in § 661.11, and that if such a waiver is granted, the "component" is treated as domestic for the purposes of calculating domestic content. UMTA also has determined on a number of occasions that it is appropriate to grant a non-availability waiver to an item or material included in a manufactured product. Accordingly, UMTA is proposing to add a new paragraph (g) to § 661.7 to reflect that such a waiver can be granted.

General Waivers. Appendix A to § 661.7 sets forth General Exceptions that have been granted by UMTA. UMTA has granted a number of such General Exceptions, and the Appendix is being revised to reflect these exceptions.

UMTA specifically seeks comments on whether it should grant any General Exception waivers in addition to those listed in Appendix A to § 661.7. In addition to those exceptions listed, UMTA has, for example, received a request for a general exception for a waiver to permit the procurement of audio visual equipment that does not meet the requirements of section 165(a). UMTA recognizes that there are a significant number of manufactured products procured by its grantees which do not comply with the strict domestic content requirements of section 165(a). Grantees are able to obtain individual "non-availability" waivers under section 165(b)(2), but the process for obtaining such waivers may be administratively burdensome especially when it is recognized that no product of the type being procured is produced or available in the United States that meets the strict requirements of section 165(a).

Application for Waivers. Although, § 661.9(c) provides that only a grantee may request a waiver from UMTA, in a very limited number of cases, UMTA has granted waivers to potential bidders, especially waivers applicable to a single "component" of rolling stock or to a single item or material of a manufactured product. Accordingly, UMTA is proposing to revise § 661.9(c) to reflect its current policy in this regard.

4. Manufacturing of Components

UMTA has been faced with a number of questions concerning what constitutes the "manufacture" of a component. For example if a bus manufacturer buys engines, transmissions, and drive units from various sources that deliver these items to the bus manufacturer's plant, the question is whether the manufacture of a power unit at such plant can be considered the domestic manufacture of the power unit as a component or whether such activity is actually part of the final assembly of the bus, which is also taking place at the same plant.

In this scenario, the principal question that must be addressed is whether the "manufacturing" of the power unit is an activity separate and apart from the "final assembly" of the bus.

It has been UMTA's position that the manufacturing of a component in an off-line fabrication area located in or at the same facility wherein final assembly takes place is not sufficient, in and of itself, to mean that such activity is component manufacture as opposed to part of final assembly. UMTA's current regulations do not define final assembly in terms of an assembly line but rather in terms of a point where final assembly is taking place. UMTA is proposing to clarify the existing regulations in this regard.

In the scenario set out above, it is possible that UMTA would conclude that a final assembly point could include a fabrication area not included within the final assembly process where the "manufacture" of a component appears to be taking place. The regulations define a "component" as that which is "directly incorporated into the end-product at the final assembly location." Thus, depending on the actual activities taking place, one would have to determine whether the power unit is "directly incorporated" into the bus or whether the engine, transmission and drive units are "directly incorporated" into the bus. If the power unit is "directly incorporated" into the bus, the power unit is considered to be a component. If the engine, transmission and drive units are "directly incorporated" into the bus, each of these items would be considered to be a component.

In the case of components, the key issue is whether the supplier is actually "manufacturing" the component rather than merely assembling the component. Where the manufacturing of the component takes place and the cost of the actual manufacturing are not the critical questions—the critical question is whether or not the activities which take place are sufficient to constitute the actual manufacture of the component in question. If a component is manufactured at the same site as the final assembly of the end product, there is no reason why this component cannot be considered to be a domestic component. The labor cost devoted to the manufacture of a component should be included in the calculation of the domestic content of that component even if it occurs at the plant in which final assembly occurs. Therefore, UMTA is proposing to amend § 661.11 to provide that a component can be manufactured at the final assembly point.

It is extremely difficult to define the level of effort need to qualify activities as the manufacture of a component. At a minimum, it is UMTA's position that there must be more than mere assembly of subcomponents to form a component. There must be sufficient activities to advance the value or improve the condition of subcomponents. UMTA is proposing general requirements to reflect this position, but specifically seeks comments to assist it in providing an adequate definition of manufacturing as it applies to components.

5. Final Assembly Requirements

The existing regulations (49 CFR 661.11(f)) define final assembly as "the effort expended at the final assembly point to manufacture the end-product." The regulations further provide, at 49 CFR 661.11(g), that "[t]he final assembly requirement will be presumed to have been met if the cost of final assembly is at least 10 percent of the overall project contract cost." UMTA does *not* require that final assembly cost be 10 percent of the overall project contract cost, but has presumed that if a supplier's costs for final assembly are 10 percent of the overall project contract cost, it is performing sufficient work to constitute legitimate final assembly. If a supplier's costs for final assembly do not meet the 10 percent presumption, UMTA has taken the position that the final assembly activities must be examined on a case-by-case basis to determine if sufficient activities are being performed to constitute "final assembly." The key issue is whether a supplier is performing adequate work to constitute legitimate "final assembly". UMTA has found that in a majority of cases, the final assembly does not meet the 10 percent presumption, but that adequate final assembly is taking place. Accordingly, UMTA is proposing to delete existing § 661.11(g) that provides that the final assembly requirement will be presumed to have been met if the cost of such assembly is at least 10 percent of the overall project cost.

6. Train Control, Communications, and Traction Power Equipment

The listing for train control equipment, communications equipment and traction power equipment (§ 661.11 (h), (i), and (j)) are *not* all inclusive lists of equipment included in each category. UMTA is proposing to add items to two of the lists in response to inquiries that have arisen since the regulation was issued. In addition, UMTA seeks comments and suggestions on items that should be added to the lists and specifically seeks comments on whether pantographs should be included as traction power equipment.

7. Certifications

UMTA has been faced with a number of questions relative to whether a bidder is bound by its original certification even if it later indicates that it erred in signing the original certification. The proper operation of the regulation set forth in Part 661 requires that it be absolutely clear, at the time of bid opening, whether a bidder will comply with the applicable "Buy America" requirements. A bidder who certifies that it will meet the "Buy America" requirements is on notice that it cannot receive a waiver if it becomes apparent after bid opening that the grounds for a waiver exist. Conversely, a bidder who certifies that it cannot meet the applicable "Buy America" requirements is on notice that it cannot be awarded a contract unless the grounds for a waiver exist, and such bidder cannot, after bid opening, change its certification to one of compliance with the applicable requirements.

Regardless of the certification submitted, each and every bidder is bound by its original certification. No bidder is given the opportunity to later indicate that it will or will not comply with the applicable "Buy America" requirements after bid opening when it is determined that the grounds for a waiver are not present, or that such grounds may be available to the bidder. To allow such a bidder to modify its certification, would give the bidder the best of both worlds—it could bid and then decide, based on the competing bids, whether it will supply a foreign or domestic "end product". The intent of the bidder must be based on the certification alone—if a bidder mistakenly executes the wrong certification, it is bound by that certification.

Therefore, UMTA is proposing to amend § 661.13 to clearly provide that a bidder is bound by its original certification and cannot be permitted to change its certification after bid opening.

8. Investigations

UMTA has conducted a number of investigations under § 661.15 and proposes to make a number of changes to this section to reflect its experience in those investigations. First, it is proposed that § 661.15(b) be revised to provide that UMTA can initiate a Buy America investigation on its own. Although the existing regulation provides that any party may petition UMTA to conduct an investigation, UMTA has the inherent authority, under the statute, to ensure that the requirements are being met, and can thus initiate an investigation on its own without a request from an interested party. Second, it is proposed that § 661.15(d) be revised to reflect that an investigated party can correspond directly to UMTA rather than through the grantee. However, such action can only be taken with the concurrence of the grantee. In a number of instances, grantees have requested that this process be followed in order to expedite the investigation. Third, UMTA is proposing to amend § 661.15(h) to more clearly reflect what is meant by confidential information. A number of parties have requested that information be treated as confidential, and UMTA has been faced with making a determination of whether all such information is actually confidential. The proposed definition will clarify this matter, and place the burden on the party claiming confidentiality to prove that the information falls under the proposed definition. Fourth, a new paragraph is proposed to reflect that UMTA, when appropriate, will conduct site visits during the course investigation. UMTA has been conducting such site visits, and the regulation is proposed to be amended to reflect current practice.

9. Suspension and Debarment

Section 661.19 is being up-dated to reflect that the Department of Transportation's suspension and debarment regulations have been issued as a final rule.

10. Pre-Award and Post-Delivery Audits

Section 319 of the STURAA requires UMTA to issue regulations requiring pre-award and post-delivery audits of rolling stock purchases made with funds available under the Urban Mass Transportation Act of 1964, as amended. One of the items that is to be addressed under such audits is compliance with the applicable Buy America requirements. UMTA will issue a separate notice of proposed rulemaking seeking comments on UMTA's proposed implementation of this statutory requirement.

D. Request for Comments

Above, UMTA has asked for comments on several particular matters. UMTA also requests comments on any of the amendments proposed today. In addition to those matters, UMTA specifically requests comments and data in response to the following questions:

1. What, if any, will be the economic impact resulting from the elimination of the ten percent price differential waiver previously applicable to the acquisition of rolling stock and associated equipment?

2. What will be the economic impact resulting from the increase of the domestic content requirement from fifty percent to fifty-five percent and eventually to sixty percent? Specifically, UMTA is interested in receiving comments and data from manufacturers who currently meet the fifty percent requirement as to the steps that will be necessary for them to meet the increased domestic content requirements, and the economic impacts

of these steps. UMTA is also specifically interested in receiving comments on whether any manufacturers will drop out of the domestic market as a result of the increased domestic content requirements.

3. What will be the economic impact resulting from the requirement that more than fifty percent of the cost of a component's subcomponents be of U.S. origin in order for the component itself to be considered to be of U.S. origin? Specifically, UMTA is interested in receiving comments and data from manufacturers as to the steps that will be necessary for them to meet this requirement, and the economic impacts of these steps. UMTA is also specifically interested in receiving comments on whether any manufacturers will drop out of the domestic market as a result of the expansion of domestic content requirements to subcomponents.

Commentors wishing acknowledgement of their comments should include a self-addressed, stamped postcard with their comments. The Docket Clerk will stamp the card with date and time the comments are received and return the card to the commentor.

II. Regulatory Impacts

A. Executive Order 12291

This action has been reviewed under Executive Order 12291. UMTA believes that the rule will not result in an annual effect on the economy of $100 million or more, and is therefore not a major rule under Executive Order 12291. However, in this NPRM, UMTA specifically asks for data on the economic impact of this proposed rule. The final Regulatory Evaluation will reflect any data brought to UMTA's attention through the docket.

B. Departmental Significance

This proposed regulation would be a "significant" rule, as defined by the Department's Regulatory Policies and Procedures on Improving Governmental Regulations, because it involves important departmental policy and will generate substantial public interest. UMTA has prepared a preliminary Regulatory Evaluation in support of this rulemaking which is on file as part of the docket to this rulemaking.

C. Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96–354, UMTA certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Act.

D. Paperwork Reduction Act

Collection of information under the Buy America regulations in Part 661 has been approved by the Office of Management and Budget (Approval Number 2132–0544). This approval expires on September 30, 1989. UMTA does not anticipate any additional collection of information required by the regulations proposed in this document that is subject to the Paperwork Reduction Act, Pub. L. 96–511, 44 U.S.C. Chapter 35. However, if the rule does result in an increased paperwork burden, that increase will be calculated when the collection of information is submitted for renewal to the Office of Management and Budget prior to the expiration date.

E. Federalism

This proposed regulation has been reviewed under Executive Order 12612 on Federalism and UMTA has determined that this action does not have implications for principles of federalism that warrant the preparation of a Federalism Assessment. If promulgated, this rule will not limit the policy making and administrative discretion of the States, nor will it impose additional costs or burdens on the States, nor will it affect the States' abilities to discharge traditional State governmental functions or otherwise affect any aspect of State sovereignty.

List of Subjects in 49 CFR Part 661

Buy America, Domestic preference requirement, Government contracts, Grant programs—Transportation, Mass transportation.

III. Proposed Amendment to 49 CFR Part 661

Accordingly, for the reasons described in the preamble, it is proposed that Part 661 of Title 49 of the Code of Federal Regulations be amended as follows:

PART 661—[AMENDED]

1. By reviewing the authority citation for Part 661 to read as follows:

Authority: Sec. 165, Pub. L. 97–424, as amended by sec. 337, Pub. L. 100–17; 49 CFR 1.51.

2. By revising § 661.1 to read as follows:

§ 661.1 Applicability.

Except as otherwise provided in this section, this part applies to all federally assisted procurements utilizing funds authorized by the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 103(e)(4); and section 14 of the National Capital Transportation Act of 1969, as amended, and which are obligated by the Urban Mass Transportation Administration January 6, 1983.

§ 661.3 [Amended]

3. By removing § 661.3(f).

4. By adding a new § 661.5(d) as follows:

§ 661.5 General requirements.

* * * * *

(d) In order for a manufactu product to be considered to be in the United States:

(1) All of the manufacturing p for the product must take place United States; and

(2) All items or material used product must be of United Stat

5. By revising the text in § 66 adding paragraph (b), (c), and (Appendix to read as follows:

§ 661.7 Waivers.

(a) Section 165(b) of the Act p that the general requirements o 165(a) shall not apply in four sp instances. This section sets out conditions for three of the four waivers based on public intere availability, and price-different Section 661.11 sets out the cond the fourth statutory waiver gov the procurement of rolling stock associated equipment.

(b) Under the provision of sec 165(b)(1) of the Act, the Admini may waive the general requirem section 165(a) if the Administra that their application would be inconsistent with the public int determining whether the condit exist to grant this public interes the Administrator will consider appropriate factors on a case-b basis, unless a general exceptio specifically set out in this part.

(c) Under the provision of se 165(b)(2) of the Act, the Admin may waive the general requiren section 165(a) if the Administra that the materials for which a w requested are not produced in t United States in sufficient and reasonably available quantities satisfacory quality. It will be pr that the conditions exist to gran non-availability waiver if no re and responsible bid is received an item produced in the United In the case of a sole source proc the Administrator will grant thi availability waiver only if the g provides sufficient information indicates that the item to be pr only available from a single sou that the item to be procured is n produced in sufficient and reaso available quantities of a satisfactory quality in the United States.

(d) Under the provision of section 165(b)(4) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that the inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent. The Administrator will grant this price-differential waiver if the amount of the lowest responsive and responsible bid offering the item or material that is not produced in the United States multiplied by 1.25 is less than the amount of the lowest responsive and responsible bid offering the item or material produced in the United States.

(e) The four statutory waivers of section 165(b) of the Act as set out in this part shall be treated as being separate and distinct from each other.

(f) The waivers described in paragraphs (b) and (c) of this section may be granted for a component or subcomponent in the case of the procurement of the items governed by section 165(b)(3) of the Act. If a waiver is granted for a component or a subcomponent, that component or subcomponent shall be considered to be of domestic origin for the purposes of § 661.11.

(g) The waivers described in paragraphs (b) and (c) of this section may be granted to a specific item or material that is used in the production of a manufactured product that is governed by the requirements of § 661.5(d). If such a waiver is granted to such a specific item or material, that item or material shall be treated as being of domestic origin.

Appendix A—General Exceptions

* * * * *

(b) Under the provisions of § 661.7(b), 15 Passenger Vans produced by Chrysler Corporation are exempt from the requirement that final assembly of the vans take place in the United States (49 FR 13944, April 9, 1984).

(c) Under the provisions of § 661.7(b), 15 Passenger Wagons produced by Chrysler Corporation are exempt from the requirement that final assembly of the wagons take place in the United States (letter to Chrysler Corporation dated May 13, 1987.)

(d) Under the provisions of § 661.7 (b) and (c), microcomputer equipment of foreign origin can be procured by grantees (50 FR 18760, May 2, 1985 and 51 FR 36126, October 8, 1986).

6. By revising the title of § 661.9, revising § 661.9 (c), redesignating (d) as (e), and adding a new paragraph (d) to read as follows:

§ 661.9 Application for waivers.

* * * * *

(c) Except as provided in paragraph (d), only a grantee may request a waiver. The request must be in writing, include facts and justification to support the waiver, and be submitted to the Administrator through the appropriate Regional Office.

(d) UMTA will consider a request for a waiver from a potential bidder or supplier only if the waiver is being sought under § 661.7 (f) or (g) of this part.

7. By revising § 661.11 (a), redesignating (b) as (d), (c) as (e), (d) as (f), (e) as (l), (f) as (o), (h) as (p), (i) as (q), (j) as (r), (k) as (s), (l) as (t), removing (g), adding new (b), (c), (g), (h), (i), (j), (k), (m), (n), (p) (12) and (13), and (r) (24), (25), (26) and (27), and revising new (d), (f), (l), (o), and (t).

§ 661.11 Rolling stock procurement.

(a) The provisions of § 661.5 will not apply in the case of the procurement of buses and other rolling stock (including train control, communication, and traction power equipment) if the cost of components and subcomponents of such items which are produced in the United States is more than 50 percent of the cost of all components and final assembly of the item takes place in the United States.

(b) Except as provided in paragraph (c) of this section, the domestic content requirement will be increased to 55% for contracts entered into after October 1, 1989, and, increased to 60% for contracts entered into after October 1, 1991.

(c) The domestic content requirement will be increased to 60% for contracts entered into after April 1, 1992 with any supplier or contractor or any successor in interest or assignee which complied with the requirements of section 165(b)(3) of the Surface Transportation Assistance Act of 1982 prior to April 2, 1987.

(d) A component is any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location. A component may be manufactured at the final assembly location if the manufacturing process to produce the component is a separate and distinct activity from the final assembly of the end product. A component is considered to be manufactured if there are sufficient activities taking place to advance the value or improve the condition of the subcomponents of that component.

* * * * *

(f) In order for a component to be considered to be of domestic origin, more than 50 percent of the subcomponents of that component, by cost, must be of domestic origin and the manufacture of the component must take place in the United States. If a component is determined to be of domestic origin, its entire cost may be utilized in calculating the cost of domestic components of an end product.

(g) A subcomponent is considered to be of domestic origin if it is manufactured in the United States.

(h) If a subcomponent that is manufactured in the United States and exported for inclusion in a component that is manufactured outside of the United States receives tariff exemptions under the procedures set forth in 19 CFR 10.11 thru 10.24, the subcomponent retains its domestic identity and can be included in the calculation of the domestic content of an end product even if such a subcomponent represents less than 50% of the cost of a particular component.

(i) If a subcomponent that is manufactured in the United States and exported for inclusion in a component manufactured outside of the United States does not receive tariff exemption under the procedures set forth in 19 CFR 10.11 thru 10.24, that subcomponent loses its domestic identity and cannot be included in the calculation of the domestic content of an end product.

(j) Raw materials produced in the United States and then exported for incorporation into a component are not considered to be a subcomponent for the purposes of calculating domestic content. The value of such raw materials is to be included in the cost of the foreign component.

(k) If a component is manufactured in the United States but contains less than 50% domestic subcomponents, by cost, the cost of the domestic subcomponents and the cost of manufacturing the component may be included in the calculation of the domestic content of the end product.

(l) For purposes of this section, the cost of a component or a subcomponent is the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent. Transportation costs to the final assembly location must be included in calculating the cost of a component. Applicable duties must be included in determining the cost of foreign components and subcomponents. If a component or subcomponent is manufactured by the bidder or offeror, the cost of the component is the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.

(m) In accordance with section 165(c) of the Act, labor costs involved in final assembly shall not be included in calculating component costs.

(n) The actual cost, not the bid price, of a component is to be considered in calculating domestic content.

(o) Final assembly is the effort expended at the final assembly point to assemble the end product.

(p) * * *

(12) Brake equipment.

(13) Brake systems.

* * * * *

(r) * * *

(24) Traction motors.

(25) Propulsion gear boxes.

(26) Third rail pick-up equipment.

(27) Pantographs.

* * * * *

(t) A bidder who is bidding on a contract for any of the items covered by section 165(b)(3) and who will comply with section 165(b)(3) and the regulations in this section is not required to follow the application for waiver procedures set out in § 661.9. In lieu of these procedures, the bidder must submit the appropriate certificate required by § 661.12 of this part.

8. By adding a new § 661.13(c) to read as follows:

§ 661.13 Grantee responsibility.

* * * * *

(c) Regardless of whether a bidder or offeror certifies that it will comply with the applicable requirement, such bidder or offeror is bound by its original certification and is not permitted to change its certification after bid opening. A bidder or offeror that certifies that it will comply with the applicable Buy America requirements is not eligible for a waiver of those requirements.

9. In § 661.15, by redesignating (c) as (d) , (d) as (e), (e) as (f), (f) as (g), (h) as (i), (g) as (j), (h) as (l), (i) as (n), (j) as (o), and (k) as (p), adding a new paragraph (c), (k) and (m), and by revising paragraph (e) to read as follows:

§ 661.15 Investigation procedures.

* * * * *

(c) In appropriate circumstances, UMTA may determine on its own to initiate an investigation without receiving a petition from a third party.

* * * * *

(e) The grantee shall be required to reply to the request under paragraph (d) of this section within 15 working days of the request. The grantee may inform UMTA that the investigated party will respond directly to UMTA.

* * * * *

(k) During the course of an investigation, with appropriate notification to affected parties, UMTA may conduct site visits of manufacturing facilities and final assembly locations as if considers appropriate.

* * * * *

(m) For purposes of paragraph (h) of this section, confidential or proprietary material is any material or data whose disclosure could reasonably be expected to cause substantial competitive harm to the party claiming that the material is confidential or proprietary.

10. By revising § 661.19 to read as follows:

§ 661.19 Sanctions.

A willful refusal to comply with a certification by a successful bidder may lead to the initiation of debarment or suspension proceedings under Part 29 of this title.

Dated: August 23, 1988.

Alfred A. DelliBovi,

Administrator.

[FR Doc. 88-19393 Filed 8-26-88; 8:45 am]

BILLING CODE 4910-57-M

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federal register

Monday
August 29, 1988

Part IV

Environmental Protection Agency

40 CFR Parts 122 and 123

Application Requirements; Duration of Certain NPDES Permits; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 123

[FRL-3394-7]

NPDES Permit Regulations; Application Requirements; Duration of Certain NPDES Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On August 18, 1987, (52 FR 30931) EPA proposed to withdraw provisions in the Agency's National Pollutant Discharge Elimination System (NPDES) regulations which authorize the Director of a NPDES program to grant case-by-case extensions for the submission of certain types of effluent data by permit renewal applicants (see 40 CFR 122.21(d)(2)(ii) and 123.62(e)). Today the Agency is promulgating a final rule withdrawing the Director's authority to grant such extensions. The effect of the repeal of these provisions would be to obligate all applicants for renewal of NPDES permits to submit effluent data along with the rest of the renewal application.

EFFECTIVE DATES: This regulation shall become effective September 28, 1988. In accordance with 40 CFR Part 23 (50 FR 7268, February 21, 1985), this regulation shall be considered issued for judicial review at 1:00 p.m. Eastern Time September 12, 1988. Under section 509(b)(1) of the Clean Water Act, judicial review of this regulation can be had only by filing a petition for review in the United States Courts of Appeals within 120 days after the regulation is considered issued for purposes of judicial review.

FOR FURTHER INFORMATION CONTACT: Stephen Bugbee, Permits Division (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; (202) 475-9539. The record for this rulemaking is available for inspection in Room 208 [NE Mall] 401 M Street SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. Background

On August 9, 1984, EPA promulgated regulations authorizing NPDES program Directors to grant extensions for permit renewal applicants to submit certain effluent data beyond the expiration date of the discharger's NPDES permit (49 FR 31840). In *National Wildlife Federation v. EPA*, 84-1547 (D.C. Cir. 1984), the petitioners challenged the data submission rule on the grounds that it was not adopted in accordance with the Administrative Procedure Act, and that the rule was inconsistent with provisions of the Clean Water Act ("CWA" or the "ACT"). EPA sought, and the Court granted, a voluntary remand of the regulation in order to address NWF's concerns in a new rulemaking.

On August 18, 1987, the Agency proposed to delete 40 CFR 122.21(d)(2)(ii) and the last sentence in 40 CFR 123.62(e) (52 FR 30931). The effect of the repeal of these provisions would be to obligate all applicants for renewal of NPDES permits to submit effluent data along with the rest of the renewal application. As noted in the notice of the proposal to repeal those provisions, the Agency believes that withdrawing the 1984 rule is appropriate because the circumstances that it was designed to address have been largely alleviated since it was promulgated.

In 1981, when the Agency originally proposed to allow the delayed submission of data, the Agency's Permit Compliance System indicated that approximately 67% of the major industrial NPDES permits had been continued beyond their expiration date. Currently, that figure is about 10%. The permitting backlog for majors has been drastically reduced; therefore, it is very unlikely that permittees will be required to resample because effluent data submitted with the rest of the NPDES permit application has become outdated by the time Directors reissue their NPDES permits. In the rare event that new data is required and, for the reasons outlined elsewhere in this preamble, the Agency believes that any inconvenience that might be caused by such resampling is justified by the benefits of having permittees submit effluent data along with the rest of their permit application. One commenter expressed concern that backlogs may not have been eliminated in every State; however, no commenter presented any specific reasons to believe that troublesome backlogs are in fact occurring. The national figures indicate that, on average, permitting authorities are on the verge of eliminating their backlogs.

At the time the data submission rule was adopted, it was believed that shortages in priority pollutant laboratory testing capacity might make it difficult for some permit applicants to submit effluent data by the deadlines in § 122.21(d) for submission of the rest of the permit application. However, as discussed more fully below, there is now adequate laboratory capacity to accommodate the testing needs of NPDES permit applicants.

Finally, EPA believed in 1984 that extensions were appropriate in light of uncertainty regarding testing regulations which had not yet been finalized by the Agency (see 49 FR 31846, (August 8, 1984)). Since EPA has promulgated regulations pursuant to settlement of the Consolidated Permit Regulations litigation (see 49 FR 37998, (September 26, 1984)), that justification for the 1984 data submission rule has been eliminated.

The NPDES regulations and the application form (EPA Form 3510-2c, Items V and VI; hereinafter called "Form 2c") require that existing industrial dischargers submit, in their applications for permit renewal, quantitative and qualitative information for certain pollutants discharged, used, produced or expected to be used at their facilities (see 40 CFR 122.21(g)(7)). The Agency believes that there will be considerable advantages to having all applicants submit this effluent data along with the rest of the permit applications. Timely submission of effluent data promotes the efficient use of permitting resources by State and federal agencies which may utilize that data in establishing permitting priorities. Also, uniform submission requirements may tend to promote public participation in the permitting activities of agencies administering the NPDES program. EPA believes that these goals justify a firm rule requiring effluent data to be submitted with the application. One commenter suggests that the agencies could use the data submitted on discharge monitoring reports to set permitting priorities. Another suggests that parameters such as plant size could be used. EPA believes that such information does not supply as complete a picture of a plant's operation and discharges as does the information submitted in Form 2c. Moreover, these suggestions ignore the need to control discharges of toxic pollutants that Congress emphasized in the adoption of the 1987 CWA amendments. As explained in the Agency's guidance for implementing section 304(1) of the Act, submission of the data required by 40 CFR 122.21(g)(7) will be used by permitting agencies to evaluate those point sources which should be controlled through the individual control strategies developed under section 304(1). Since current permits may not contain limitations on the discharges of toxic pollutants that will be controlled in permits reissued pursuant to section 304(1), discharge monitoring reports based on current permits may not fully reflect the toxic pollutants being discharged by permittees. Commenters express concerns about the possible backlogs that might result from the implementation of new requirements under the 1987 amendments, and the possibility that permittees may have to resample their effluent if data submitted with the application is outdated by the time of reissuance. As previously noted in this preamble, permitting authorities are on the verge of eliminating the major permit backlogs and are reissuing those permits without significant delays. In the event that delays do occur, it is extremely unlikely that the delays would extend beyond the three year sampling requirement contained in the permit application Form 2c, and provided that all data are representative of the present discharge. EPA believes that, in the rare event that new sampling is required the burden that may result from permittees' having to resample their effluent prior to permit reissuance is justified.

In the August 18, 1987 notice, the Agency noted that an informal survey revealed that none of the Agency's ten regional offices were aware of any requests for extensions made to EPA. A few commenters noted that the rule had been used by State agencies and that it might be needed in the future to address situations such as temporary plant shutdowns, variations in plant operations, weather conditions and laboratory delays. As discussed further below, the Agency believes that permitting authorities retain sufficient discretion, even without the authority to grant extensions contained in § 122.21(d)(2)(ii), to deal with situations where it is impossible for the permittee to plan their sampling activites such that they can submit data by the deadlines established in § 122.21(d).

Other commenters noted that the lack of records of the rule's use indicates a need for procedural safeguards if the rule is maintained. EPA considered retaining the rule with the addition of procedural safeguards to assure that it is being properly applied. For example, the rule could have been amended to provide that requests must be made in writing and that copies of all requests and decisions be made available for public inspection. The EPA or the State agency administering the program would have to weigh the need for data against the justifications for the extensions. The Agency believes that imposing these administrative requirements on permittees and the relevant agencies is not justified and that, for the reasons discussed in this preamble, a firm rule requiring timely submission of effluent data is the most appropriate course of action.

The final rule, by deleting 40 CFR 122.21(d)(2)(ii) and the last sentence in 40 CFR 123.62(e), requires all permit renewal applicants to submit the data required in § 122.21(g)(7), (9) and (10) at the time that they submit the rest of their permit renewal application. The rule does not affect the authority of Directors to waive the requirement that the application be submitted 180 days prior to the permit expiration date, 40 CFR 122.21(d)(2)(i), or such other deadline prior to the permit expiration date established by State law.

II. Responses to Comments on the Proposal

In response to our proposal, EPA received comments on several issues associated with submission of effluent data. The Agency's responses to all of those comments are discussed below.

1. Laboratory Capacity

One commenter questioned the basis for the Agency's claim that laboratory capacity for testing the 129 priority pollutants was no longer of concern. Another commenter expressed concern that laboratory capacity shortages may occur because of new initiatives under the 1987 Clean Water Act (CWA) amendments, including increased emphasis on biological testing. However, commenters submitted no evidence that indicated that a shortage in laboratory capacity currently exists or is likely to develop.

As noted in the preamble to the proposed rule, the Agency believes that there has been a sufficient increase in laboratory capacity to accommodate the full range of testing needs of NPDES applicants. The results of an independent study of the commercial market for environmental laboratory services conducted during 1987 show the market and capacity of environmental laboratories have increased at least four-fold since the early 1980's. Currently, over 1,000 laboratories in the U.S. are performing commercial environmental analytical services with a significant portion of them providing the full priority pollutant analyses. The study indicated over 1,400 GC/MS systems are currently in use for priority pollutant analyses. In the Superfund Program, 75 organic and inorganic laboratories were operating at 50 to 60% capacity on January 1, 1988. The remainder of this capacity is available to the regulated community. In addition to chemical analytical services, EPA recently identified over 120 commercial, university and industrial laboratories in 38 States, providing biological testing services.

EPA is aware of only one recent laboratory shortage for NPDES-required testing, which was due to an apparent shortage of *Mysidopsis bahia* (a small crustacean) needed for toxicity testing of the effluent from Gulf of Mexico oil and gas drilling activities (51 FR 33130 (Sept. 18, 1986)). This shortage occurred after the promulgation of the general permit for those activities. EPA temporarily stayed some of the permit's testing requirements so that breeders could develop their supply of *M. bahia* to meet new demand for the highly specialized resource. Possible shortages of test species for biomonitoring is not directly relevant to this rulemaking, however. The extension provided under §§ 122.21(d)(2)(ii) and 123.62(e) only applied to data submitted pursuant to § 122.21(g)(7), (9) and (10), and these provisions relate to sampling for specific pollutants, not whole effluent toxicity testing. As pointed out above, adequate laboratory capacity exists for pollutant specific analyses.

EPA is not aware of any permittees actually having problems with obtaining laboratory testing to obtain the information required by 40 CFR 122.21(g)(7). The shortage anticipated in 1984 due to new testing requirements never developed. EPA has no reason to believe that supply will not continue to grow to meet demand, especially if demand is made more predictable because of firm deadlines for data submission.

2. Storm Water

Several commenters suggested EPA should retain the 1984 regulation because of the uncertainty regarding the effluent data submission requirements that will apply under the storm water provisions in the 1987 CWA amendments. The comments centered on: (1) The uncertainty surrounding testing requirements for existing dischargers; (2) the difficulty in collecting storm water data in certain areas of the country where it may not be possible to collect required data in a timely fashion; and (3) the possibility of a backlog of storm water permit applications after EPA promulgates new permit application requirements.

In response to the first comment, it is clear that the existing regulations require an operator of a storm water discharge that is currently covered by a NPDES permit to submit a completed application (see 40 CFR 122.21). Although EPA is currently considering changing permit application requirements for storm water discharges, these changes would not create uncertainty that would prevent a discharger from submitting the appropriate data when reapplying within the time limits established by 40 CFR 122.21(d). Furthermore, as part of the Agency's storm water rulemaking that will implement section 402(p) of the Act, EPA is planning to solicit comments on reducing application requirements for storm water discharges from the current requirements contained in Form 2c. In any case, there will be an opportunity for the public to raise their concerns about the interplay between new and existing data submission requirements for storm water in the context of the Agency's storm water rulemaking.

In response to the second comment, EPA will consider such problems in the development of storm water regulations. As to existing permittees that may have difficulty obtaining storm water effluent data due to a dry spell immediately prior to their permit renewal, the Agency believes, as discussed below, that permitting agencies have sufficient discretion to deal with such situations even without the extension provisions.

In response to the third comment, although a backlog of storm water permits may result, the backlog problem will primarily be caused by first time permit applications for discharges not currently covered by a NPDES permit. Today's rule will not affect that backlog since it applies only to permit renewals. Some commenters noted the possible effect of a backlog of storm water permits on the processing of other permits. However, the potential for backlog of first time permits is reduced by the 1987 CWA amendments' staggering the dates by which applications for storm water permits must be filed; permit applications for storm water discharges associated with industrial activity and discharges from municipal separate storm sewer systems serving a population of 250,000 or more which are not currently covered by a permit need not be filed until February 4, 1990; permit applications for storm water discharges from municipal separate storm sewer systems serving a population of 100,000 or more but less than 250,000, need not be filed until February 4, 1992. The Agency also anticipates that many States will minimize backlogs by issuing general permits for storm water discharges. Furthermore, as discussed elsewhere in this preamble, the Agency believes that the timely submission of effluent data outweighs the inconvenience that might result from the rare requirement that a permittee be required to resample the effluent prior to permit reissuance.

3. Ability to Obtain Representative Effluent Data

Several commenters expressed concern that dischargers would not be able to obtain the effluent data necessary to submit a complete application because of extended shutdowns, plant modifications, variations in plant operations (i.e., peak versus non-peak flows), unscheduled repairs or extreme weather conditions, thereby causing permits to expire and leading to unpermitted discharges or plant shutdowns until new permits are issued. For example, commenters stated that some steam electric facilities often have long intervals between their discharges, and discharges of storm water in arid areas may be similarly intermittent. Where such an extended period of no discharge happens to coincide with the period preceding the permit expiration, it would be difficult for the permittee to supply current effluent data. Other commenters noted that short term shutdowns due to weather conditions (freezing, flooding or dry spells) or repairs coinciding with the period prior to permit expiration may necessitate the granting of extensions for submission of effluent data beyond the permit expiration date.

The Agency believes it is reasonable to expect permittees to plan their sampling sufficiently far in advance of permit expiration so that such problems do not arise. Under 40 CFR 122.21(d), permittees are obligated to submit a completed application 180 days prior to permit expiration. Given that permittees must plan their sampling accordingly, there should be few cases where short-term shutdowns prevent sampling until after the permit expiration date. Furthermore, seasonal weather conditions and regular repair operations can be anticipated, and the permittee should plan sampling activity with these events in mind. In addition, applicants for EPA issued permits can request that they be able to submit the data up to the permit expiration date rather than 180 days prior thereto (see 40 CFR 122.21(d)(2)(i)). Applicants in States that do not have a rule analogous to § 122.21(d) should plan their sampling sufficiently far in advance of the permit application deadline.

The agency believes that under normal conditions such dischargers should be able to plan their effluent sampling over the three year period prior to permit expiration presently provided for in permit application Form 2c. If circumstances do result in unusually long periods of no discharge, Directors have the discretion to consider data from earlier discharges in determining whether the application is complete (see 40 CFR 122.21(e)). If necessary, the Director can request that the less recent information submitted as part of a complete application be supplemented with data from the next discharge. The permit could be modified, in accordance with 40 CFR 122.62(a)(2), if the supplemental information shows that modification is appropriate. EPA recognizes, as several commenters pointed out, that there may be some administrative burden associated with modifying permits based on newly submitted effluent data. However, as noted elsewhere in this preamble, the Agency believes such resampling will be rare and when required, such a burden is justified by the need for timely submission of effluent data.

Several commenters stated that eliminating the extension provision would require some plants to operate at peak capacity merely for the purpose of collecting representative effluent data, imposing unnecessary costs and resulting in unnecessary discharges. Commenters have failed to show how eliminating the provisions would require them to operate at peak capacity. Form 2c only requires the submission of data that is representative of a facility's operations. Dischargers do not have to provide data from peak operations unless, in fact, that is representative of the operations of the facility.

Several commenters, who raised the possibility of delays in receiving laboratory analysis reports, are in favor of retaining the current rule. However, EPA believes that since such delays are certainly foreseeable, it behooves permittees to conduct their sampling sufficiently far in advance to account for such possible delays.

4. Statutory Authority for the Extension Rule

Several commenters argued that the rule being repealed today was inconsistent with language in section 304(i) of the Clean Water Act directing EPA to "promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information" from permittees. Furthermore, the National Wildlife Federation asserted in its comments that the court order granting the Agency's motion for a voluntary remand of the extension provision required EPA to address NWF's concerns that the regulation violated section 304(i). The Agency does not believe that the extension provision is prohibited by section 304(i) of the Act, but rather that the rule should be repealed for the reasons outlined above in this preamble. In any case, the Agency does not believe that the DC Circuit's remand of the extension provision requires the Agency to address legal arguments made by NWF which are not germane to this rulemaking. Because the Agency proposed to rescind the rule and is adopting the same approach in the final regulation, it is not relevant whether the Agency would have the authority to retain the rule if it decided that such a course was appropriate. That legal question is simply not posed by this rulemaking.

III. Executive Order 12291

Executive Order 12291 requires EPA and other agencies to perform regulatory impact analyses of major regulations. Major rules are those that impose a cost on the economy of $100 million or more annually or have certain other economic impacts. This regulation is not a major rule because it merely deletes a time extension for submission of Form 2c effluent data. Thus, it meets none of the criteria of a major rule as set forth in section 1(b) of the Executive Order. This rule has been submitted to the Office of Management and Budget (OMB) for review. Any comments from OMB and any EPA response will be available for public inspection at EPA in Room 208 (NE Mall) 401 M Street SW., Washington, DC 20460.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act, 2 U.S.C. 601 *et seq.*, requires EPA and other agencies to prepare an initial regulatory flexibility analysis for all regulations that have a significant impact on a substantial number of small entities. No regulatory flexibility analysis is required, however, where the head of an agency certifies that the rule will not have significant economic impact on a substantial number of small entities. Since this regulation does not impose any new requirements on permit applicants, but merely adjusts the timing for submission of effluent data, the Administrator certifies, pursuant to 5 U.S.C. 605(b), that this final regulation will not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Parts 122 and 123

Administrative practice and procedure, Reporting and recordkeeping requirements, Water pollution control.

Lee M. Thomas,
Administrator.

Date: August 19, 1988.

For the reasons set out in the preamble, 40 CFR Parts 122 and 123 are amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for Part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

§ 122.21 [Amended]

2. In § 122.21, paragraph (d)(2)(ii) is removed.

PART 123—STATE PROGRAM REQUIREMENTS

3. The authority citation for Part 123 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

§ 123.62 [Amended]

4. In § 123.62, the last sentence in paragraph (e) is removed.

[FR Doc. 88-19296 Filed 8-26-88; 8:45 am]

BILLING CODE 6560-50-M

federal register

Monday
August 29, 1988

Part V

Federal Communications Commission

47 CFR Part 36

Common Carrier Services; MTS and WATS Market Structure; Joint Board Establishment; Final Rule and Supplemental Notice of Proposed Rulemaking

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 36

[CC Docket Nos. 78-72, 80-286 and 86-297]

Common Carrier Services; MTS and WATS Market Structure; Amendment of the Commission's Rules and Establishment of a Joint Board

AGENCY: Federal Communications Commission.

ACTION: Final rules.

SUMMARY: The Federal Communications Commission grants, in part, reconsideration of its decision to adopt revisions of the Separations Manual, Part 36 of its Rules. The Commission: (1) Reconsidered its decision to require that carriers count intermediate terminations when assigning costs in Category 4.23, Central Office Equipment (COE), All Other Interexchange Circuit Equipment; (2) reinstated the former Part 67 procedures for Other Billing and Collecting Expenses as an interim measure pending the outcome of a Supplemental NPRM regarding Revenue Accounting Expenses which refers this issue to the Joint Board in Docket No. 80-286 and is summarized elsewhere in this volume; (3) simplified Lifeline Connection Assistance Expense procedures; (4) denied petitions for reconsideration of the new separations procedures for Category 3 COE, Local Switching Equipment, except to the limited extent necessary to clarify the calculation of the transition from the former Part 67 allocation factors to the new Part 36 allocation factor; (5) denied petitions requesting revisions in the separations procedures for Category 1 COE, Operator Systems Equipment; (6) affirmed its decision to adopt one Separations Manual to be used by both large and small carriers; (7) affirmed its decision to adopt different allocation factors to be used by large and small carriers in the allocation of General Support Facilities; (8) revised the Separations Manual to permit the National Exchange Carrier Association (NECA) to adjust the Universal Service Fund (USF); and (9) affirmed the legal basis for its decision to adopt the new Part 36 separations procedures.

EFFECTIVE DATE: January 1, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Cindy Schonhaut, Special Counsel, Federal-State Joint Board Matters, Accounting and Audits Division, Common Carrier Bureau, at (202) 632-7500.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration, CC Docket Nos. 78-72, 80-286 and 86-297, FCC 88-216; adopted June 27, 1988, and released August 8, 1988.

The full text of Commission decisions are available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

Summary of Order on Reconsideration

1. Several parties have filed petitions for reconsideration or clarification of the revisions to the Separations Manual recently adopted by the Commission. In revising the Manual, the Commission adopted the recommendations of the Joint Board in CC Docket No. 80-286 and the Joint Board in CC Docket No. 86-297 and recodified the Separations Manual as the new Part 36 of the Commission's rules effective January 1, 1988. In that decision, the Commission conformed the separations rules to the recently revised Uniform System of Accounts, simplified separations procedures and made changes in the separations rules applicable to Central Office Equipment and Revenue Accounting Expenses.

2. Under the current separations procedures of Part 36 of the Commission's Rules, local exchange carriers (LECs) are required to count intermediate terminations in assigning the costs in Category 4.23 COE to subcategories. *See* 47 CFR 36.126(e)(3). Several parties urged the Commission to reconsider this requirement and suggested that carriers be required to count only end terminations. The Commission decided to reconsider its decision to include intermediate terminations in the assignment of costs in Category 4.23 COE and required instead that LECs count only the terminations at the ends of circuits. The Commission believes that a count of only end terminations is consistent with its intentions as well as those of the Joint Board in Docket 80-286. The Commission required that LECs implement this change effective January 1, 1988 and file revised access charges to reflect this change with a minimum of forty-five days notice.

3. The Commission also reinstated the former Part 67 procedures for the Other Billing and Collecting Expense subcategory on an interim basis because the new procedures produced unintended and anomalous results and have proven difficult to apply. In a Supplemental Notice of Proposed Rulemaking summarized elsewhere in this volume, the Commission seeks comments and data on the separations procedures for Revenue Accounting Expenses and refers this issue to the Joint Board in Docket No. 80-286.

4. In addition, the Commission granted the petitions of USTA and others requesting revision in the Commission's Rules to provide an adjustment for Lifeline Connection Assistance Expense that is comparable to the USF adjustment. Because the recently adopted procedure requiring the assignment of Lifeline Connection Assistance Expense to account categories has proven to be unduly burdensome and does not provide for the identification of the expenses associated with Lifeline Connection Assistance, the Commission revised these procedures.

5. The Commission also denied petitions to reconsider its decision to adopt new procedures for the categorization and allocation of Category 3 COE because the new procedures reflect cost-causation principles, simplify the separations process and reduce administrative burdens on carriers. The Commission clarified, however, that the small carriers eligible for the weightings should implement the five-year phase-in of the new debt allocation factor. Because neither the Joint Board in Docket No. 80-286 nor the Commission has sought comment on Category 1 COE procedures, the Commission also denied petitions requesting revision in the separations rules for these procedures.

6. The Commission affirmed its decision to adopt one Separations Manual for the use of both large and small carriers. The Commission affirmed that a modified Class B Manual adopted for all carriers would simplify the separations process without reducing the accuracy of jurisdictional results. Moreover, the Commission stated that the benefits of simplifying separations procedures apply equally to both large and small carriers. The Commission also stated that the use of one manual will promote uniformity and reduce inconsistent separations results and inconsistent access charges. The Commission believes that the modified Class B Manual will best achieve a balance between the goal of simplification and the need to reasonably reflect cost causation principles.

7. The Commission also affirmed its decision to adopt bifurcated procedures for the allocation of General Support

Facilities. Under these procedures, large carriers allocate General Support Facilities on the basis of an expense-related factor and small carriers on the basis of a plant-related factor. The data submitted in this proceeding indicated that the adoption of a bifurcated approach will substantially mitigate the revenue requirement impact of the new manual. The Commission believes that the bifurcated approach reflects the appropriate balance between the need to adopt procedures that reflect cost-causation principles and the concern for the revenue requirement impact of those procedures.

8. The Commission granted NECA's request that it be allowed to resize the USF beginning April 1, 1989 to reflect updated data filed with NECA by the carriers. This approach will make the USF more accurately reflect actual costs and is consistent with the Lifeline Connection Assistance procedures.

9. Finally, the Commission affirmed the legal basis for its decision to adopt the new Part 36 procedures and concluded that sufficient notice was provided to satisfy the requirements of the Administrative Procedure Act. It also concluded that the Joint Boards followed appropriate procedures and afforded all interested persons an adequate opportunity to comment.

Ordering Clauses

10. Accordingly, *It is hereby ordered,* That the Petitions for Reconsideration or Clarification filed in these proceedings *are granted* to the extent provided herein and otherwise *are denied.*

11. *It is further ordered,* That the modifications of Part 36 of the Commission's rules described above and set forth in Appendix A *are adopted,* effective thirty days after publication in the **Federal Register,** except that the interim Section 36.380 will become effective on the effective date of the next annual interstate access tariff revision.

12. *It is further ordered,* That local exchange carriers shall implement the revised separations procedures for Category 4.23 Central Office Equipment adopted in this Order effective January 1, 1989.

13. *It is further ordered,* That the Petition for Waiver of § 36.381 of this Commission's Rules filed by the Bay Springs Telephone Company *is denied.*

List of Subjecs in 47 CFR Part 36

Communications common carrier, Telephone, Uniform system of accounts, Reporting and recordkeeping requirements, Jurisdictional separations procedures.

This action is taken pursuant to 47 U.S.C. 154 (i) and (j), 201, 202, 203, 205, 218, 221(c), 403, and 410.

Federal Communications Commission.

H. Walker Feaster III,
Acting Secretary.

Part 36 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 36—[AMENDED]

1. The authority citation for Part 36 continues to read as follows:

Authority: 47 U.S.C. 151, 154 (i) and (j), 205, 211(c), 403 and 410.

2. Section 36.125 is amended by revising paragraph (f) to read as follows:

§ 36.125 Local switching equipment—Category 3.

* * * * *

(f) For study areas with fewer than 50,000 access lines, Category 3 investment is apportioned by the application of an interstate allocation factor that is the lesser of either .85 or an amount as follows: Beginning January 1, 1993, the amount will equal the DEM factor specified in § 36.125(b) multiplied by a weighting factor. During the 1988–1992 period, the amount will equal the sum of two elements for the appropriate transition year (the A component times the composite allocator plus the B component times the DEM allocator times a weighting factor). The A and B components are specified in § 36.125 (d) and (e). The applicable weighting factor is as follows:

Number of access lines in service in study area	Weighting factor
0 to 10,000	3.0
10,001 to 20,000	2.5
20,001 to 50,000	2.0
50,001 or above	1.0

* * * * *

3. Section 36.380 is revised to read as follows:

§ 36.380 Other billing and collecting expense.

(a) This classification includes the salary expense, including supervision, general accounting administrative, and miscellaneous expense, associated with the preparation of customer bills other than carrier access charge bills and with other revenue accounting functions not covered in § 36.379. Included in this classification are the expenses incurred in the preparation of monthly bills, initial and final bills, the application of service orders to billing records (establishing, changing, or discontinuing customers' accounts), station statistical work, controlling record work and the preparation of revenue reports.

(b) Pending the adoption of permanent procedures, the expenses assigned this classification are segregated on the basis of the relative number of users of the following services: Message toll telephone and telegram (excluding semi-public where tolls are not itemized on the bill); TWX; exchange including semi-public; directory advertising; and private line services, as determined by analysis for a representative period. In determining the number of users, an individual customer is counted once for each class of service which it uses; for example, a majority of customers are counted both as message toll telephone and telegram users and as exchange users.

(1) Expense allocated to message toll telephone and telegram users is apportioned among the operations on the basis of the relative number of non-affiliated company telegram message, state message toll telephone messages and interstate message toll telephone messages. In this apportionment, telegram messages are treated as exchange.

(2) Expense allocated to TWX users is apportioned between state and interstate operations on the basis of the relative number of TWX connections.

(3) Expenses allocated to exchange, including semi-public users, and to directory advertising users are assigned to the exchange operation.

(4) Expense allocated to private line services users is apportioned among the operations on the basis of the relative number of interstate and intrastate private line service accounts, as determined by analysis for a representative period.

(c) If end user common line charges for intrastate toll access are assessed in a particular state, one-half of the end user common line access charge billing expense shall be apportioned to the interstate operations. If no end user common line charge is assessed for intrastate toll access, all of the end user common line access charge billing expense shall be assigned to interstate operations.

4. Section 36.631 is amended by adding paragraph (e) to read as follows:

§ 36.631 Expense adjustment.

* * * * *

(e) Beginning April 1, 1989, the expense adjustment calculated pursuant to § 36.631 (c) and (d) shall be adjusted each year to reflect changes in the size of the Universal Service Fund resulting from adjustments calculated pursuant to

§ 36.612(a) made during the previous year. If the resulting amount exceeds the previous year's fund size, the difference will be added to the amount calculated pursuant to § 36.631 (c) and (d) for the following year. If the adjustments made during the previous year result in a decrease in the size of the funding requirement, the difference will be subtracted from the amount calculated pursuant to § 36.631 (c) and (d) for the following year.

5. Section 36.741 is amended by revising paragraph (c) to read as follows:

§ 36.741 Expense adjustment.

* * * * *

(c) The expense adjustment calculated pursuant to § 36.741 (a) and (b) shall be subtracted from total intrastate expenses and added to total interstate expenses.

§ 36.101 [Amended]

6. In § 36.101(a), Section Arrangement, change "36.128" to "36.126."

7. In § 36.101(a), Section Arrangement, insert "Rural Telephone Bank Stock 36.172" to precede the category "Material and Supplies . . . ."

§ 36.112 [Amended]

8. In § 36.112(a), change "Expense" to "Expenses" everywhere it appears.

§ 36.125 [Amended]

9. In § 36.125(a) fourth sentence, change "transverters", to "transmitters".

§ 36.126 [Amended]

10. In § 36.126(e)(3)(i) first sentence, change "circuits." to "circuits: Interstate Private Line, State Private Line, Message, and TWX."

§ 36.153 [Amended]

11. In § 36.153(a)(2)(i), second sentence, change "so" to "directly".

§ 36.154 [Amended]

12. In § 36.154(f)(4)(ii), change "Sec. 36.154(d)" to "Sec. 36.154 (d) and (e)".

13. In § 36.154(f)(4)(iii), change "Sec. 36.154(d)" to "Sec. 36.154 (d) and (e)".

§ 36.172 [Amended]

14. In § 36.172(b), change "Part 67" to "Part 36".

§ 36.191 [Amended]

15. In § 36.191(a), change "where" to "or where".

§ 36.201 [Amended]

16. In § 36.201(a), remove "36.201 and".

§ 36.216 [Amended]

17. In § 36.216(a), change "represented" to "representative".

§ 36.301 [Amended]

18. In § 36.301(a), add the following the precede the category "Corporate Operations Expenses":

Telephone Operator Services	36.374
Published Director Listing	36.375
All Other	36.376
Category 1—Local Bus. Office Expense	36.377
Category 2—Customer Services (Revenue Accounting)	36.378
Message Processing Expense	36.379
Other Billing and Collecting Expense	36.380
Carrier Access Charge Billing and Collecting Expense	36.381
Category 3—All other Customer Service Expense	36.382

§ 36.310 [Amended]

19. In § 36.310(c), change "67.2 (c) and (d)" to "36.2 (c) and (d)".

§ 36.331 [Amended]

20. In § 36.331(b), remove "36" in second sentence, following the word "Operations".

In § 36.331(b), change "investment 36.142(a)" to "Investment as per 36.142(a)".

§ 36.631 [Amended]

21. In § 36.631(c)(2), change "§ 36.662(b)" to "§ 36.622(b)".

Appendix-Glossary [Amended]

22. In Appendix-Glossary, the definition for Customer Dialed Charge Traffic is revised to read: "Message toll charge is made, except for that traffic recorded by means of message registers".

23. In Appendix-Glossary, the definition for Study Area, is revised to read: "A telephone holding company's operations within a single state. Study area boundaries shall be frozen as they are on November 15, 1984".

[FR Doc. 88-19511 Filed 8-26-88; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 36

[CC Docket Nos. 78-72, 80-286, and 86-297; FCC 88-216]

Common Carrier Services; MTS and WATS Market Structure; Amendment of the Commission's Rules and Establishment of a Joint Board

AGENCY: Federal Communications Commission.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Commission has issued a Supplemental Notice of Proposed Rulemaking (Supplemental NPRM) seeking comment and data on the appropriate allocation method for Revenue Accounting Expenses. In an Order on Reconsideration summarized elsewhere in this volume, the Commission granted petitions for requiring that it reconsider its decision to revise the separations procedures for Revenue Accounting Expenses. The Commission also adopted modifications of Part 36 of its Rules, effective thirty days after publication in the Federal Register, except that the new § 36.380, which is applicable to Revenue Accounting Expenses, will become effective on the effective date of the next annual interstate access tariff revision.

DATES: Comments and data must be filed on or before September 9, 1988 and reply comments on or before September 26, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Art Leahy, Accounting and Audits Division, Common Carrier Bureau, at (202) 634-1861.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 78-72, 80-286 and 86-297, FCC 88-216; adopted June 27, 1988, and released August 8, 1988.

The full text of Commission decisions are available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, 2100 M Street NW., Suite 140, Washington, DC 20037, (202) 857-3800.

Summary of Supplemental Notice of Proposed Rulemaking

1. The original Notice of Proposed Rulemaking in this proceeding was released in 1980. *Amendment of Part 67 of the Commission's Rules,* CC Docket No. 80-286, 78 FCC 2d 837 (1980). The Joint Board in Docket No. 80-286 requested comments on specific approaches for the allocation of Revenue Accounting Expenses in *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* CC Docket Nos. 78-72 and 80-286, FCC 86J-3, released July 25, 1986, 51 FR 30, 522 (August 27, 1986). In April 1987, the Joint Board in CC Docket No. 80-286 recommended that the Commission adopt new separations procedures for the allocation of Revenue Accounting Expenses, formerly in Account 662 and currently in Accounts 6620 and 6623. Revenue Accounting Expenses represent a major portion of the costs incurred by the local exchange carriers (LECs) in performing billing and collecting services for other carriers. The Commission adopted the Joint Board's recommendation that it revise the separations procedures for these expenses to reflect the decrease in interstate billing and collecting functions performed by the LECs on behalf of AT&T.[1]

2. Under the revised separations procedures of Part 36 of the Commission's Rules, Revenue Accounting Expenses are segregated into three subcategories. Message Processing Expense and Carrier Access Charge Billing and Collecting Expense are allocated essentially the same as under the former Part 67 rules. Other Billing and Collecting Expense has been combined with End User Common Line Access Charges and is allocated on the basis of a formula that reflects the number of users of various local and toll services. This allocation factor is further refined to reflect the ratio of the number of users of those services in 1984 to the number of users in the study year. In addition, the rules establish a maximum 33 percent and a minimum 5 percent interstate allocation for the Other Billing and Collecting Expense subcategory. The Commission found this formula unworkable and stated that it resulted in problematic jurisdictional allocations that did not reflect the actual amount of billing and collecting services performed by the LECs on behalf of the interexchange carriers (ICs).

3. In the Supplemental NPRM,
Commission sought further com
and data on the new separation
procedures for Revenue Accoun
Expenses and referred a perma
resolution of this issue to the Joi
in CC Docket No. 80-286. Pendi
resolution of this inquiry, the
Commission reinstated the form
67 procedures for Other Billing a
Collecting Expense on an interin

4. The Commission requested
LECs submit data, as specified i
Appendix B of the Supplemental
to assist the Joint Board and the
Commission in the evalution of
alternative allocation methods. I
requested that parties propose s
proposals for a permanent form
will be consistent with the
Commission's objectives. It requ
that the Joint Board analyze tho
proposals and submit a
recommendation.

Comments

5. Interested parties may file
comments and data on the issue
discussed above on or before Au
1988, and reply comments on or
September 30, 1988.

Regulatory Flexibility Act

6. We certify that the Regulat
Flexibility Act[2] is not applicab
rule changes we are adopting in
proceeding. In accordance with
provisions of Section 605 of the
copy of this certification will be
the Chief Counsel for Advocacy
Small Business Administration a
time of publication of a summar
Supplemental NPRM in the **Fede**
Register. As part of our analysis
proposals submitted in response
Supplemental NPRM, however,
Board in Docket No. 80-286 and
Commission will consider the im
proposals on small telephone
companies, *i.e.,* those serving 50,
fewer access lines.[3] The action

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[1] These procedures are codified in §§ 36.378-36.381 of the Commission's Rules, 47 CFR 36.378-36.381.

[2] 5 U.S.C. 601.

[3] Because of the nature of local exchang
access service, this Commission conclude
small telephone companies are dominant
fields of operation and, therefore, are not
entities as defined by the Regulatory Flex
See MTS and WATS Market Structure, 93
241, 338-89 (1983). Thus, this Commissio
required by the terms of the Regulatory F
Act to apply the formal procedures set fo
We are nevertheless committed to reduci
regulatory burdens on small telephone co
whenever possible consistent with our oth
interest responsibilities. Accordingly, we
chosen to utilize, on an informal basis, ap
Regulatory Flexibility Act procedures to a
effect of proposed regulations on small tel
companies.

proposed herein would have a beneficial economic impact on all such telephone companies because the new procedures will reduce administrative burdens and will better reflect cost-causation principles. The carriers will therefore be able to develop rates that better reflect their actual costs.

Paperwork Reduction Act

7. We have analyzed the proposal contained herein with respect to the Paperwork Reduction Act of 1980 [4] and have tentatively concluded that it will not, if adopted, impose new or modified information collection requirements on the public. The instant proposal is a general solicitation of comments from the public and as such, does not constitute a collection of information.[5] All comments will be considered in this proceeding. Parties need not file data for their comments to be considered in this proceeding. Therefore, implementation of the proposed rules will not be subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act.

Ex Parte Contacts

8. For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[6] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) Releases a final order; (2) issue a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.[7] During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission, Joint Board member or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[8] In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) If written, is not served on the parties to the proceeding; or, (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[9] Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of the same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide, on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner, Joint Board member or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state, by docket number, the proceeding to which it relates. For Joint Board actions, special *ex parte* rules apply.[10] For Joint Board actions, all written materials which are not filed in accordance with a pleading cycle established by the Joint Board shall be accompanied by a Petition for Leave to File showing cause why the material should be considered by the Joint Board. The Joint Board will not consider any filing made outside the authorized pleading cycle and received by the Commission less than fifteen days [11] in advance of a Joint Board meeting at which the Joint Board is to consider the subject matter of that filing. Written *ex parte* presentations, as defined by the Commission's rules, need not be accompanied by a Petition for Leave to File and may be received in the discretion of the Joint Board member or staff personnel involved. No written *ex parte* presentations, however, shall be made during the fifteen day period immediately preceding a Joint Board meeting except in response to an inquiry by a member of the Joint Board or its staff.

Ordering Clauses

9. Accordingly, it is ordered, That the Joint Board in CC Docket No. 80-286 shall review the comments, proposals and data filed regarding the separations procedures applicable to Revenue Accounting Expenses and shall prepare recommendations to this Commission on the issue raised herein.

List of Subjects in 47 CFR Part 36

Communications common carrier, Telephone Uniform system of accounts, Reporting and recordkeeping requirements, Jurisdictional separations procedures.

This action is taken pursuant to 47 U.S.C. 154(i) and (j), 201, 202, 203, 205, 218, 221(c), 403, and 410.

Federal Communications Commission.

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-18761 Filed 8-26-88; 8:45 am]

BILLING CODE 6712-01-M

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[4] 44 U.S.C. 501.

[5] *See* 5 CFR 1320.7(k)(4).

[6] *See generally* 47 CFR 1.1206(a).

[7] 47 CFR 1.1202(f).

[8] 47 CFR 1.203.

[9] 47 CFR 1.1202(b).

[10] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 89 FCC 2d 36 (1982).

[11] In calculating this fifteen day period, neither the day on which the material is filed nor the day on which the Joint Board meeting is scheduled shall be counted.

federal register

Monday
August 29, 1988

Part VI

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Part 8

Federal Acquisition Regulation (FAR); Approval of Requirements for Acquisition of Printing; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 8

Federal Acquisition Regulation (FAR); Approval of Requirements for Acquisition of Printing

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to withdraw coverage in FAR 8.802 (a) and (c) pertaining to the requirements in 44 U.S.C. 501(2) for approval, by the Congressional Joint Committee on Printing, of requirements for acquisition of printing.

Withdrawal of the referenced FAR coverage is intended to be responsive to the fundamental congressional concern that gave rise to enactment of section 309 of the Legislative Branch Appropriations Act, Pub. L. 100–202, Continuing Resolution for FY 1988, as expressed in its accompanying report language.

DATE: Comments should be submitted to the Far Secretariat at the address shown below on or before October 28, 1988, to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to:
General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 88–42 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Regulatory Flexibility Act

The proposed rule does not appear to have a significant impact on a substantial number of small entities and analysis of the proposed revision indicates that it is not a "significant revision" as defined in FAR 1.501, i.e., it does not alter the substantive meaning of any coverage in the FAR having a significant cost or administrative impact on contractors or offerors, or have significant effect beyond the internal operating procedures of the issuing agencies.

Accordingly, and consistent with section 1212 of Pub. L. 98–525 and section 302 of Pub. L. 98–577 pertaining to publication of proposed regulations (as implemented in FAR Subpart 1.5, Agency and Public Participation) solicitation of agency and public views on the proposed revision is not required. Since such solicitation is not required, the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) does not apply.

B. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 8

Government procurement.

Dated: August 17, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Part 8 be amended as set forth below:

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

1. The authority citation for Part 8 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Ch. 137; and 42 U.S.C. 2473(c).

2. Section 8.802 is amended by removing the existing paragraphs (a) and (c); by redesignating the existing paragraphs (b), (d), and (e) as (a), (b), and (c); and by revising in new paragraph (b) the first sentence to read as follows:

8.802 Policy

* * * * *

(b) The head of each agency shall designate a central printing authority; that central printing authority may serve as the liaison with the Congressional Joint Committee on Printing (JCP) and the Public Printer on matters related to printing. * * *

* * * * *

[FR Doc. 88–19502 Filed 8–26–88; 8:45 am]

BILLING CODE 6820–61–M

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Monday
August 29, 1988

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Part VII

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 45 and 52
Federal Acquisition Regulation (FAR); Special Tooling; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 45 and 52

Federal Acquisition Regulation (FAR); Special Tooling

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering a change to FAR 45.306, Providing special tooling, and the clause at 52.245–17, Special Tooling, to provide clear policy and uniform procedures for furnishing or acquiring special tooling under fixed-price contracts. Complementary changes are proposed for sections 45.305, 45.307, and 45.308, and clauses at 52.245–2, 52.245–17, 52.245–18, and 52.245–19.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 28, 1988 to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Street NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 88–36 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 45.306, Providing special tooling, and the clause at 52.245–17, Special Tooling, are proposed for revision to clarify that the Special Tooling clause is used in fixed-price contracts when the Government will furnish special tooling to the contractor, or the contractor will acquire or fabricate special tooling, and the Government intends to maintain rights to the special tooling until such time that the Government decides it wants full title to the special tooling, or has no further interest in the special tooling.

Under the proposed revision to the Special Tooling clause, the types of information which contractors must keep in their property control systems is delineated. The periodic reporting of this information to the Government is also defined. The costs of increased recordkeeping is offset by reductions in contractors' management costs by eliminating the requirements for physical inventories, assignment of condition codes, and preparation of inventory schedules.

These FAR changes are intended to improve the management of special tooling, the retention and disposal decisions made by the Government, and the opportunities for using the special tooling to increase competition when contracting for postproduction requirements.

Other changes are made to FAR 45.305, 45.307, and 45.308 to locate the prescriptions for the Special Test Equipment clause and the Government Property Furnished "As Is" clause in the FAR sections which address the policy on the use of these clauses. These changes are intended to clarify when the clauses are to be used.

B. Regulatory Flexibility Act

The proposed changes to FAR Subpart 45.3 and the clauses at 52.245–2 and 52.245–17 may have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is on file in the FAR Secretariat. The Initial Analysis will be submitted to the Chief Counsel for Advocacy, Small Business Administration.

A copy of the IRFA may be obtained from the FAR Secretariat, Attn: Margaret A. Willis, Room 4041, GS Building, 18th and F Streets NW., Washington, DC 20405. Comments are invited. Comments from small entities concerning the affected FAR sections will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite FAR Case 88–610 in correspondence.

C. Paperwork Reduction Act

This proposed rule contains an information collection requirement. Accordingly, a revised burden estimate for OMB clearance number 9000–0075 is being submitted to the Office of Management and Budget for approval under 44 U.S.C. 3501, *et seq.* Public comments concerning this request will be invited through a subsequent **Federal Register** notice.

List of Subjects in 48 CFR Parts 45 and 52

Government procurement.

Dated: August 17, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Parts 45 and 52 be amended as set forth below:

1. The authority citation for Parts 45 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 45—GOVERNMENT PROPERTY

45.305 [Reserved]

2. Section 45.305 is removed and reserved.

3. Section 45.306–2 is revised to read as follows:

45.306–2 Special tooling under cost-reimbursement contracts.

Title to special tooling under cost-reimbursement contracts is acquired in all cases. The clause used for this purpose is 52.245–5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts).

4. Section 45.306–3 is revised to read as follows:

45.306–3 Special tooling under fixed-price contracts.

(a) *Criteria for acquisition.* In deciding whether or not to acquire title to special tooling, or rights to title, under fixed-price contracts, the contracting officer shall consider the following factors:

(1) The current or probable future need of the Government for the items involved (including in-house use) and the estimated cost of producing them if not acquired.

(2) The estimated residual value of the items.

(3) The administrative burden and other expenses incident to reporting, recordkeeping, preparation, handling, transportation, and storage.

(4) The feasibility and probable cost of making the items available to other offerors in the event of future acquisitions.

(5) The amount offered by the contractor for the right to retain the items.

(6) The effect on future competition and contract pricing.

(b) *Decision not to acquire special tooling.* In contracts in which the Government will not acquire title to special tooling, or rights to title, special requirements may be included in the Schedule of the contract (e.g., requirement governing the contractor's capitalization of special tooling costs).

(c) *Contract clause.* The contracting officer shall insert the clause at 52.245–17, Special Tooling, in solicitations and contracts when a fixed-price contract is contemplated, and either the contract will include special tooling provided by the Government or the Government will acquire title or right to title in special tooling to be acquired or fabricated by the contractor for the Government, other than special tooling to be delivered as an end item under the contract. The Special Tooling clause shall apply to all special tooling accountable to the contract.

45.306.4 [Removed]

5. Section 45.306–4 is removed.

6. Section 45.307–1 is amended by removing in paragraph (b) the reference "45.306–2(c)" and inserting in its place the reference "45.306–3(a)", and by adding paragraph (c) to read as follows:

45.307–1 General.

* * * * *

(c) The contracting officer shall insert the clause at 52.245–18, Special Test Equipment, in solicitations and contracts when contracting by negotiation and the contractor will acquire or fabricate special test equipment for the Government but the exact identification of the special test equipment to be acquired or fabricated is unknown.

7. Section 45.308 is amended by adding paragraph (c) to read as follows:

45.308 Providing Government production and research property "as is."

* * * * *

(c) The contracting officer shall insert the clause at 52.245–19, Government Property Furnished "As Is," in solicitations and contracts when a contract other than a consolidated facilites contract, a facilities acquisition contract, or a facilities use contract is contemplated and Government production and research property is to be furnished "as is" (see 45.106 for additional clauses that may be required).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.245–2 is amended by removing in the title of the clause the date "(APR 1984)" and inserting in its place the date "(AUG 1988);" by adding in paragraph (c)(2) a second sentence; and by revising paragraph (c)(3) to read as follows:

52.245–2 Government Property (Fixed-Price Contracts)

As prescribed in 45.106(b)(1), insert the following clause:

* * * * *

(c) * * *

(2) * * * However, special tooling accountable to this contract is subject to the provisions of the Special Tooling clause and is not subject to the provisions of this clause. * * *

(3) Title to each item of facilities, and special test equipment acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

* * * * *

9. Section 52.245–17 is revised to read as follows:

52.245–17 Special Tooling.

As prescribed in 45.306–3(c), insert the following clause:

SPECIAL TOOLING (AUG 1988)

(a) *Definition.* "Special Tooling" means jigs, dies, fixtures, molds, patterns, tapes, gauges, other equipment and manufacturing aids, all components of these items, and replacements of these items that are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or performing particular services. It does not include material, special test equipment, facilities (except foundations and similar improvements necessary for installing special tooling), general or special machine tools, or similar capital items. Special tooling, for the purpose of this clause, includes all special tooling acquired or fabricated by the Contractor for the Government (other than special tooling to be delivered as a line item) or furnished by the Government for use in connection with and under the terms of the contract.

(b) *Title.* The Government retains title or option to take title to all special tooling subject to this clause until such time as title or option to take title is relinquished by the Contracting Officer as provided for in subparagraphs (j)(2) and (j)(3) of this clause.

(c) *Risk of loss.* Except to the extent that the Government shall have otherwise assumed the risk of the loss to special tooling applicable to this clause, in the event of the loss, theft or destruction of or damage to any such property, the repair or replacement shall be accomplished by the Contractor at its own expense.

(d) *Special tooling furnished by the Government.*

(1) Except as otherwise provided, all Government furnished special tooling is provided "as is." The Government makes no warranty whatsoever with respect to special tooling furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when last available for inspection by the Contractor under the solicitation.

(2) The Contractor may repair any special tooling made available on an "as is" basis. Such repair will be at the Contractor's expense except as otherwise provided in this clause. Such property may be modified as necessary for use under this contract at the Contractor's expense, except as otherwise directed by the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of the Government.

(3) If there is any change in the condition of special tooling furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation or the Government directs a change in the quantity of special tooling furnished or to be furnished, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts, and, as directed by the Contracting Officer, either (a) return such items at the Government's expense or otherwise dispose of the property or (b) effect repair to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Government shall not be otherwise liable for any delivery of special tooling in a condition or in quantities other than that when originally offered.

(e) *Use of special tooling.* The Contractor may use special tooling subject to this clause on other Government effort when specifically approved by the Contracting Officer for this contract and the Contracting Officer for the contract under which the special tooling will be used. Any other use of the special tooling shall be subject to advance written approval of the Contracting Officer. In the event the Government elects to remove any special tooling that is required for continued contract performance, the contract shall be equitably adjusted in accordance with paragraph (m) of this clause.

(f) *Property control.*

(1) *Records.* The Contractor's special tooling records shall provide the following minimum information regarding each item of special tooling subject to this clause and shall be made available for Government inspection at all reasonable times.

(i) Number or code of the contract to which the tooling is accountable and the number or code of the contract for which the tooling was originally acquired or fabricated.

(ii) Retention codes as defined below:

(A) *Primary Code.* Assign one of the following to each item of special tooling.

Code A. Spares Tooling. Required to provide a provisioned spare part or assembly.

Code B. Judgment (Insurance) Tooling. Fabrication tools for parts that are not provisioned spares but which in the judgment of the Contractor will be required at some time for logistic support of the end item.

Code C. Rate Tooling. Necessary to economically produce at increased rates (e.g., for mobilization or surge) but not essential for parts fabrication at low production rates.

Code D. Assembly Tooling. Required for manufacture of the end product but not required for production of spare parts. Those items having no postproduction need except for potential modification or resumed production programs.

(B) Secondary Code. Assign one or more of the following codes, as applicable, to each item of special tooling:

Code 1. Repair Tooling. Items which are capable of being used for repair of provisioned parts or assemblies.

Code 2. Replaceable Tooling. Spares or judgment tooling (primary retention codes A or B) which, in the opinion of the Contractor, can be effectively and economically replaced by "soft" tooling on an "as required" basis in lieu of retention of the "hard" production tooling for supporting postproduction requirements.

Code 3. Maintenance Tooling. Items which are capable of being used for depot level maintenance of the applicable end item or components thereof.

Code 4. Crash Damage Tooling. Items which apply to provisioned or nonprovisioned parts or assemblies which are designated as or have the potential of being required for crash damage repairs.

(iii) Nomenclature, function or comparable code.

(iv) Tool part number or code.

(v) Tool identification number, or quantity of each tool part number or code, if tool identification number is not assigned.

(vi) Part number(s) of item(s) on which used (complete hierarchy of part numbers).

(vii) Unit price.

(viii) Storage method code. Assign one of the following:

Code J. Inside storage.

Code K. Outside storage.

Code L. Other.

(ix) Estimated weight of tool, if over 25 pounds.

(x) Estimated volume of tool, if over 3 cubic feet.

(xi) Location of Contractor, subcontractor, vendor for each item. Use Federal Supply Code for Manufacturers (FSCM), or name and address if code is not available.

(xii) All operation sheets and other data as are necessary to show the manufacturing operation or processes for which such items were used, designed, or modified.

(2) *Identification or tagging.* To the extent practicable, the Contractor shall identify all special tooling subject to this clause in accordance with the Contractor's identification procedures.

(g) *Maintenance.* The Contractor shall maintain special tooling in accordance with sound industrial practice. These requirements do not apply to those items designated by the Contracting Officer for disposal as scrap or identified as of no further interest to the Government under paragraph (j), Disposition instructions, of this clause.

(h) *Identification of excess special tooling.* The Contractor shall promptly identify and report all special tooling in excess of the amounts needed to complete full performance under this contract (see subdivision (i)(3)(i) of this clause).

(i) *Lists of special tooling.* The Contractor shall periodically prepare and distribute lists of special tooling as described below:

(1) *Initial list.* If this is a supply contract, the initial list shall be furnished within 60 days after delivery of the first production end item under this contract or completion of the initial provisioning process, whichever is later, and shall include all special tooling subject to this clause as of the reporting date. If this is a contract for storage of special tooling, the initial list shall be provided within 60 days of contract implementation.

(2) *Updated list.* When the last production end item under this contract is delivered, the Contractor shall furnish an updated list of special tooling that shall contain all tools accountable to the contract. However, if this contract represents the final production contract, the Contractor shall provide this updated list of all tools not later than 180 days prior to scheduled delivery of the last production end item.

(3) *Excess special tooling list.*

(i) *Excess special tooling.* Expect for items subject to subdivision (i)(3)(ii) of this clause, lists of special tooling excess to this contract shall be furnished within 60 days of the date that the item is determined to be excess. The Contractor shall include in this list the information prescribed in Format of lists, subparagraph (i)(4) of this clause, as well as the applicable excess code as follows:

Code V. Excess to contract requirements with no follow-on requirements.

Code W. Excess to contract requirements but can be used to support actual or anticipated follow-on requirements.

Code X. Excess due to changes in design or specification of the end items.

Code Y. Excess due to nonserviceable or nonrepairable condition.

Code Z. Other.

(ii) *Termination inventory.* These items shall be submitted on SF 1432 or by computer list attached to an SF 1432 in accordance with FAR 45.606. Format and content of this submission will be as prescribed by Format of lists, subparagraph (i)(4) of this clause, but will contain information as prescribed by FAR Subpart 45.6, in effect on the date of award of this contract.

(4) *Format of lists.* Lists furnished by the Contractor shall state the type of list and shall include all information from Records, subparagraph (f)(1) of this clause, items (i) through (xi). All lists will be grouped by primary retention code as prescribed in subdivision (f)(1)(ii)(A) of this clause and further listed in tool part number sequence.

(5) *Distribution of lists.* The Contractor shall submit two copies of lists to each of the following recipients unless otherwise directed:

(i) The Contracting Officer;

(ii) The Administrative Contracting Officer; and

(iii) The inventory control point designated by the contracting office.

(j) *Disposition instructions.* The Contracting Officer shall provide the Contractor with written disposition instructions within 180 days of receipt of the updated list as prescribed by subparagraph (i)(2) of this clause and within 90 days of the receipt of excess special tooling lists reported in accordance with subparagraph (i)(3) of this clause. The Contracting Officer may direct disposition by any of the methods listed in subparagraphs (j)(1) through (j)(3) of this clause, or a combination of such methods. The Contractor shall comply with such disposition instructions.

(1) The Contracting Officer may identify specific items of special tooling to be retained or give the Contractor a list specifying the products, parts, or services including follow-on requirements for which the Government may require special tooling and request the Contractor to identify all usable items of special tooling on hand that were designed for or used in the production or performance of such products, parts, or services. Once items of usable special tooling required by the Government are identified, the Contracting Officer may:

(i) Direct the Contractor to transfer specified items of special tooling to follow-on contracts requiring their use. Those items shall be furnished for use on the contract(s) as specified by the Contracting Officer and shall be subject to the provisions of the gaining contract(s); or

(ii) Request the Contractor to enter into an appropriate storage contrct for special tooling specified to be retained by the Contractor for the Government. Tooling to be stored shall be stored pursuant to a storage contract between the Government and the Contractor; or

(iii) Direct the Contractor to transfer title to the Government (to the extent not previously transferred) and deliver to the Government those items of special tooling which are specified for removal from the Contractor's plant.

(2) The Contracting Officer may direct the Contractor to sell, or dispose of as scrap, for the account of the Government, any special tooling not specified by the Government pursuant to subparagraph (j)(1) of this clause. To the extent that the Contractor incurs any costs occasioned by compliance with such direction, for which it is not otherwise compensated, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract. The net proceeds of all sales shall either be credited to the cost of contract performance or shall be otherwise paid to the Government as directed by the Contracting Officer. Sale of special tooling to the prime Contractor or any of its subcontractors is subject to the prior written approval of the Contracting Officer.

(3) The Contracting Officer may furnish the Contractor with a statement disclaiming further Government interest or right in specified special tooling.

(4) Restoration of Contractor's premises. Unless otherwise provided in this contract, the Government has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if special tooling is withdrawn or if other special

tooling is substituted, then the equitable adjustment under paragraph (m) of this clause may properly include restoration or rehabilitation costs.

(k) *Access to special tooling.* The Contractor shall provide access to special tooling subject to this clause at all reasonable times to all individuals designated by the Contracting Officer.

(l) *Storage or shipment.* The Contractor shall promptly arrange for either the shipment or the storage of special tooling specified in accordance with the final disposition instructions in subdivisions (j)(1)(ii) or (j)(1)(iii) of this clause. Tooling to be shipped shall be properly packaged, packed, and marked in accordance with the directions of the Contracting Officer. All operation sheets and other data necessary to show the manufacturing operations or processes for which the items were used or designed shall accompany special tooling to be shipped or stored or shall otherwise be provided to the Government as directed by the Contracting Officer. To the extent that the Contractor incurs costs for storage, shipment, packing, crating, or handling under this paragraph and not otherwise compensated for, the contractor price shall be equitably adjusted in accordance with the Changes clause of this contract.

(m) *Equitable adjustment.* When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for—

(1) Any delay in delivery of Government-furnished special tooling;

(2) Delivery of Government-furnished special tooling in a condition not suitable for its intended use;

(3) A decrease in or substitution of special tooling; or

(4) Failure to repair or replace Government-furnished special tooling for which the Government is responsible.

(n) *Subcontract provisions.* In order to perform this contract, the Contractor may place subcontracts (including purchase orders) involving the use of special tooling. If the full cost of the tooling is charged to those subcontracts, the Contractor agrees to include in the subcontract appropriate provisions to obtain Government rights and data comparable to the rights of the Government under this clause (unless the Contractor and Contracting Officer agree in writing that such rights are not of interest to the Government). The Contractor agrees to exercise such rights for the benefit of the Government as directed by the Contracting Officer.

(End of clause)

52.245-18 [Amended]

10. Section 52.245-18 is amended by removing in the introduction text the reference "45.305(b)" and inserting in its place the reference "45.307-1(c)".

11. Section 52.245-19 is amended by revising the introductory text to read as follows:

52.245-19 Government Property Furnished "As Is."

As prescribed in 45.308(c), insert the following clause:

* * * * *

[FR Doc. 88-19504 Filed 8-26-88; 8:45 am]

BILLING CODE 6820-61-M

33025

federal register

Monday
August 29, 1988

Part VIII

Department of Housing and Urban Development

Office of the Assistant Secretary for Community Planning and Development

24 CFR Part 570

Urban Development Action Grant (UDAG); Selection Criteria; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

24 CFR Part 570

[Docket No.: R-88-1383; FR 2449]

Urban Development Action Grant (UDAG); Selection Criteria

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: This rule implements the amendments under the Housing and Community Development Act of 1987 and the HUD—Independent Agencies Appropriations Act, 1988 to section 119 of the Housing and Community Development Act of 1974—Urban Development Action Grant (UDAG) statute, 42 U.S.C. 5318, by modifying the UDAG project selection criteria and by modifying the definitions of eligible cities. This selection system is expected to spread UDAG funds to more areas of the country.

EFFECTIVE DATE: Under section 7(o)(3) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(o)(3)), this final rule cannot become effective until after the first period of 30 calendar days of continuous session of Congress which occurs after the date of the rule's publication. HUD will publish a notice of the effective date of this rule following expiration of the 30-session-day waiting period. Whether or not the statutory waiting period has expired, this rule will *not* become effective until HUD's separate notice is published announcing a specific effective date.

FOR FURTHER INFORMATION CONTACT: Stanley Newman, Director, Office of Urban Development Action Grants, Room 7262, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, (202) 755-6290. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Section 515 of the Housing and Community Development Act of 1987 (Pub. L. 100-242, approved February 5, 1988), (1987 Act), and the HUD-Independent Agencies Appropriation Act, 1988 (Pub. L. 100-202, approved December 22, 1987) amended section 119 of the Urban Development Action Grants (UDAG) statute, 42 U.S.C. 5318. On May 2, 1988, the Department published proposed rules governing these amendments in the **Federal Register** (53 FR 15566). The new provisions included the following areas:

- A two-phased 65%–34% selection system with statutorily assigned weights for impaction, distress, project merit factors and bonus points.
- A $10 million cap on individual grants for FY 1988 and FY 1989.
- Modifications to the "Definitions" section.
- Revisions to the project selection criteria, use of repaid grant funds, certifications and the application submission and review schedule.

Interested parties were given until June 1, 1988 to comment on the proposed rules. Twelve responses were received. All comments have been reviewed and their disposition is discussed below.

Section 570.451 Definition

Two commenters suggested that HUD eliminate the General Revenue Sharing Program eligibility as a factor for defining eligible "Indian Tribe" because of inequities that use of this factor would cause. For example, new tribes may have been formed after the termination of the General Revenue Sharing program, and therefore not be able to meet the eligibility criteria. HUD understands this concern. However, since this is a statutory requirement, HUD has no authority to change it. The definition remains as proposed.

A commenter suggested that the definitions of "transaction" and "economic development component" place onerous requirements upon projects containing public facility activities. The commenter felt that such definitions will hurt projects with integrally related public facilities because their leveraging ratios will be lower and therefore less competitive in project selection. HUD determined that one of the key interests of the UDAG program is to leverage private investment. The UDAG program should not pay for public facilities as a sole funding source. Other budgetary funds (State and local) should be used for such public facilities. The selection system does allocate 2 points for State/Local funds per UDAG dollar. The two definitions, however, remain as proposed.

One commenter supported the addition of three Hawaiian counties as "cities" in terms of defining eligibility for the UDAG program. Such an addition has been made and is a result of legislation amending the UDAG statutes.

Section 570.455 Eligible activities

HUD was urged to restore project selection points for projects in which minorities are participants as contractors, major suppliers, equity investors, lessors, owners or private participating parties. The Housing and Community Development Act of 1987 contains an exclusive, prescriptive list of criteria for selection. HUD has no authority to modify the list. Minority business participation is, however, encouraged in § 570.455(d).

Section 570.458 Full application

Concern was expressed about the potential impact on the selection process caused by the change in relocation requirements under section 509 of the Housing and Community Development Act of 1987 after October 1, 1988. A commenter suggested that the financial burdens of the new relocation requirement will adversely affect UDAG projects. After analysis of the issue, HUD remains convinced that, as a matter of law, if an applicant chooses to submit a UDAG application that contains residential relocation, the applicant must comply with the relocation requirements and bear any such costs.

One commenter asked for clarification of the criteria for, and the documentation needed for obtaining, the selection point for "Pressing Employment Need". The Department does not require documentation from an applicant to award this selection point. Instead, a general statement describing a condition, such as a plant closing, which has had a significant impact on employment in the community and which would be alleviated by the activities proposed in the UDAG application would suffice. The regulation identifies these activities as reemploying workers in a skill that has recently suffered a sharp increase in unemployment locally; retraining recently unemployed residents in new skills; or providing training to increase the local pool of skilled labor.

A commenter asked for clarification of the work "area" in citing the requirement for the applicant to certify that "the area has a severe shortage of housing for low and moderate income persons", in regard to "Pressing Residential Need". The term "area" refers to the applicant's entire geographic jurisdiction, i.e., city or urban county. HUD will accept the applicant's certification as to a severe housing shortage for low and moderate income persons.

Section 570.459 Criteria for Selection

Support was expressed by one commenter for the new statutorily imposed two-tiered selection system (65%–35%) as a method to make areas in the West more competitive under the UDAG program.

Another comment recommended revising the UDAG project selection system to give priority to proposed activities of enterprise zones in coordination with UDAG projects. This idea was analyzed carefully and HUD determined that a selection factor for UDAG projects within a federally designated enterprise zone would be added. This factor falls within the statutory selection criterion at section 119(d)(1)(C)(vii) for commitment of State or local government funding or special economic incentives.

A question was raised concerning how points for the leveraging ratio factor are assigned to multi-component transactions and whether they are averaged. The answer is that the total private investment for all components will be divided by the UDAG amount to arrive at a single leveraging ratio for the project. All transactions must, however, individually meet the 2.5:1 leveraging test of private dollars to UDAG dollars.

Two commenters felt that the leveraging ratio factor was receiving too many points in the selection system (10 out of 33) and should be reduced, with the points spread to other factors. Another comment suggeted that there were not enough points for lower income people or people with the greatest need for jobs, and that taxes and UDAG funds per job were misleading measures and should be reduced on the point scale. HUD has carefully analyzed these suggestions and has made the following changes to the regulation for the selection system:

1. *Leveraging Ratio* (10)—No change. It is HUD's view that this measure is a key factor in the program and deserves this level of points.
2. *New Permanent Jobs* (3)—No change.
3. *UDAG Funds Per New Permanent Job* (7)—No change.
4. *Percent New Low/Moderate Income Jobs* (2)—This factor was increased from 1 to 2 points in response to comments.
5. *Percent New Minority Jobs* (2)—This factor was increased from 1 to 2 points in response to comments.
6. *Retained Jobs* (2)—No change.
7. *Pressing Employment Need* (1)—No change.
8. *Pressing Residential Need* (1)—No change.
9. *Tax Benefit Per UDAG Dollar* (2)—This factor was reduced from 5 to 2 points in response to comments.
10. *State/Local Funds Per UDAG Dollar* (2)—No change.
11. *Federal Enterprise Zone Designation* (1)—This factor was added in response to a comment, to recognize the importance of locating UDAG projects within federally designated enterprise zones.

Two respondents cited the need for a definition of new permanent jobs and a methodology for determining net new jobs for UDAG projects. As one of these respondents noted, there are instructions for calculating net jobs in the UDAG application form. When the application form is revised, clarification will be provided in instructing applicants as to the methodology for the calculation. HUD will continue to deduct jobs transferred within the jurisdiction of the applicant and only count new jobs for the community. HUD will continue to permit applicants, developers and other parties to submit evidence as to the anticipated job transfers for the specific project. If there are any complaints about job transfers, this information will be analyzed to see if it rebuts the presumptions as to job transfers.

The selection system gives an unintentional bias to commercial projects over industrial projects particularly with UDAG funds per job, tax benefits and percent low/moderate income jobs, one commenter believed. No specific suggestions were made by the commenter. After careful analysis, HUD notes that a substantive majority of small city projects are industrial activities, but that large cities primarily submit commercial type projects or mixed use activities. Retained jobs, as noted in the proposed regulation, have been increased to 2 points to account for the need to address industrial plant closings.

A commenter cited the need for a definition of private leverage. Such a definition is provided in § 570.451(1), and in the UDAG application.

Another commenter questioned the method for the award of points—was it to be "all or nothing" or based on a range? Points will be assigned based on a range, with the most points being awarded for the project in the round with the highest factor (e.g., for leveraging, 10 points will be assigned for the highest leveraged project, scaling down to 0 points for the lowest leveraged project). A commenter also proposed that a project lose points if it adversely impacts a previously funded UDAG project from the same applicant. This interesting idea was considered but determined to be impracticable, since it is presumed that applicant cities and urban counties act in their own self-interest and would not seek assistance for adverse impact on themselves.

Section 570.461 Post preliminary approval requirements

Clarification was requested concerning whether housing
rehabilitation is an eligible use of
loan repayments. Since housing re
an eligible activity in the UDAG
program, it is an eligible activity f
of repayments.

Another commenter requested
clarification whether a UDAG loa
repayment can be used to pay the
of UDAG project administration. T
new language in the Act specifies
repayments can be made availab
the recipient for economic develo
activities that are eligible for fund
under the UDAG program or secti
of the Housing and Community
Development Act of 1974 (Commu
Development Block Grants). There
repayments may be used for any a
eligible under the UDAG program
activity eligible under the CDBG
program which is related to econo
development, including administra
costs for economic development
projects. Activities eligible under
CDBG program but not related to
economic development (such as
construction or recreational facili
provision of public services) are n
eligible uses for UDAG repayment

One commenter suggested that
assertion in the proposed rule tha
rule did not constitute a "major ru
defined by Executive Order 12291
incorrect. HUD continues to believ
the rule does not meet the Executi
Order's definition of a major rule.
Executive Order addresses gener
economic effect. A general econo
effect would be realized if the fun
were being awarded in such a wa
there was a cost or benefit to the
economy of $100 million or more.
example, if $100 million or more w
not going to be spent because of
constraints in the proposed rule, c
$100 million or more were going t
spent inefficiently, then there wou
implications under the Executive
Instead, what HUD has done in th
proposed rule is to establish revis
criteria (required by statute) whic
mean that the mix of particular p
to be funded may change under th
proposed rule, but the aggregate i
on the economy will not.

The same commenter expresse
concern that the proposed rule wi
a significant economic impact on
substantial number of small citie
cited a particular UDAG project
application as a case in point. Th
in the case cited by the comment
indicate that this rule will not ma
any more or less likely that the
application in question would be
funded. HUD regards the rule as
completely neutral with reference

facts suggested in the commenter's case example.

Other Matters

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50, which implement section 102(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of Rules Docket Clerk at the above address.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 issued by the President on February 17, 1981. Analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Under the Regulatory Flexibility Act (5 U.S.C. 601), the Undersigned certifies that this rule would not have a significant economic impact on a substantial number of small entities because the number of affected small entities would not be substantial. The funding for the UDAG program has been reduced in recent years and the effect of the changes will be neutral on the competitive position of small entities.

This rule was listed as item 988 in the Department's Semiannual Agenda of Regulations published April 25, 1988 (53 FR 13854, 13883) under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance number is 14.221—Urban Development Action Grants.

List of Subjects in 24 CFR Part 570

Community development block grants, Grant programs: Housing and community development, Loan programs: Housing and community development, Low and moderate income housing, New communities, Pockets of poverty, Small cities.

Accordingly, the Department amends 24 CFR Part 570 as follows:

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

1. The authority citation for 24 CFR Part 570 continues to read as follows:

Authority: Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301–5320); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. Section 570.451 is amended by adding new paragraphs (m), (n), (o) and (p), to read as follows:

§ 570.451 Definitions.

* * * * *

(m) The term "city" includes large cities and small cities, as defined in this section, and the counties of Kauai, Maui and Hawaii in the State of Hawaii and American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands and Indian tribes.

(n) A "transaction" is a major project element which can be undertaken separately and can be evaluated on its own merits.

(o) An "economic development component" is a major project element which cannot be undertaken separately but which generates its own cash flow separate from other components of the project, exclusive of publicly-owned infrastructure and parking.

(p) An "Indian tribe" means one that is located on a reservation or in an Alaskan Native Village and was eligible for the General Revenue Sharing Program before that program's September 30, 1986 repeal (31 U.S.C. 6701 *et seq.*). For the purposes of UDAG, an Indian reservation includes former Indian reservations in Oklahoma, as determined by the Secretary of the Interior.

In § 570.452, paragraphs (c)(2), (d)(1)(ii), (d)(2)(ii) and (e) are revised and (d)(1)(ii)(E) is added, to read as follows:

§ 570.452 Distressed communities.

* * * * *

(c) * * *

(2) If the city or urban county's percentage of poverty is less than one-half of the HUD-established standard, or if the change in per capita income is more than twice the HUD-established standard, then it must meet four of the following seven minimum standards: percentage of housing constructed before 1940; percentage of proverty; per capita income change; population growth lag/decline; job lag/decline; unemployment; unemployment criteria used to establish the Labor Surplus Area designation.

(d) * * *

(1) * * *

(ii) If the percentage of poverty is less than one half of the HUD-established standard, or if the change in per capita income is more than twice the HUD-established standard, then the city must meet four of the following five standards.

* * * * *

(E) Percentage of Poverty.

* * * * *

(2) * * *

(ii) If the percentage of poverty is less than one-half of the HUD-established standard, or if the change in per capita income is more than twice the HUD-established standard, then the city must meet four of the following six minimum standards: Percentage of housing constructed before 1940; percentage of poverty; per capita income change; population growth lag/decline; job lag/decline; unemployment criteria used to establish the Labor Surplus Area designation.

* * * * *

(e) *Indian Tribes.* An Indian tribe that meets the definition in § 570.451(p) shall be presumed to meet the minimum standards of distress. However, the Secretary may deny eligibility to a tribe if available data establishes that the tribe's distress is not comparable to that of potentially eligible jurisdictions.

4. Section 470.455 is amended by adding new paragraphs (c) and (d), to read as follows:

§ 570.455 Eligible activities.

* * * * *

(c) Projects whose increased energy efficiency facilitates broader economic development, preserves scarce fuels or promotes development and use of renewable energy resources are encouraged.

(d) Projects in which minorities are participants as contractors, major suppliers, equity investors, lessors, owners or private participating parties are encouraged.

5. In § 570.456, paragraph (a) is revised to read as follows:

§ 570.456 Ineligible activities and limitations on eligible activities.

(a) Large cities and urban counties may not use assistance under this subpart for planning the project or developing the application. However, they may use entitlement community development block grant funds for this purpose, provided that the UDAG project meets the eligibility test of this part. Any small city which submits a project application which is selected for preliminary approval and for which legally binding grant agreement and for which a release of funds pursuant to 24 CFR Part 58 has been issued may devote up to three (3) percent of the approved amount of its action grant to defray its actual costs in planning the project and preparing its application.

* * * * *

(6) Section 570.458 is amended to revise paragraph (c)(14)(ix)(I) and to add new paragraphs (c)(14) (xvi) and (xvii) as follows:

§ 570.458 Full applications.

* * * * *

(c) * * *
(14) * * *
(ix) * * *

(I) The acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as required under § 570.457(a)(1) and HUD implementing regulations at 24 CFR Part 42; the requirements in § 570.457(a)(2) governing the residential antidisplacement and relocation assistance plan under section 104(d) of the Housing and Community Development Act of 1974 (the Act) (including a certification that the applicant is following such a plan); the relocation requirements of § 570.457 (a)(3) and (b) governing displacement subject to section 104(k) of the Act; and the relocation requirements of § 570.457(a)(4) governing optional relocation assistance under section 105(a)(11) of the Act.

* * * * *

(xvi) For an appropriate project, the project will relieve the most pressing employment need of the applicant by:

(A) Reemploying workers in a skill that has recently suffered a sharp increase in unemployment locally;

(B) Retraining recently unemployed residents in new skills; or

(C) Providing training to increase the local labor pool of skilled labor.

(xvii) For an appropriate project, the area has a severe shortage of housing for low and moderate income persons. (The applicant should be aware that this certification could affect its compliance with the new provisions under section 104(d) of the Housing and Community Development Act of 1974).

7. Section 570.459 is revised to read as follows:

§ 570.459 Criteria for selection.

(a) *General.* Each funding round, HUD will review all new applications received and all applications pending consideration and will determine which meet the basic program requirements. The specific nature and purpose of the proposed project will determine the extent to which each of the selection criteria in paragraphs (e) and (f) of this section will apply. In utilizing the discretion of the Secretary when providing assistance and apply selection criteria under this section, the Secretary will not discriminate against applications on the basis of: (1) The type of activity involved, *i.e.*, whether the applicant is a city of an urban county.

(b) Requirements which must be met to be considered in project selection:

(1) *A firm private commitment.* No project will be funded under this subpart unless there is a firm private commitment to finance and carry out the proposed project. The private commitment must have clear, direct relationship to the activities for which funding is requested.

(2) *Leveraging Ratio.* Each project, each transaction within a project, and each economic development component within a project must have a leveraging ratio of at least $2.50 of private funds to every $1.00 of action grants funds.

(3) *A firm commitment of public resources.* If a project requires a commitment of other public resources, then there must be a firm public commitment.

(4) *Funds required*—The Secretary must determine that the project requires action grant funds by finding that:

(i) The action grant funds will not subsitute for local funds (see § 570.458(c)(14)(iii));

(ii) But for the receipt of the action grant funds, the project would not be undertaken; and

(iii) The grant amount provided is the least amount necessary to make the project feasible. For Fiscal Years 1988 and 1989 the maximum grant amount for any project is $10,000,000.

(5) *Impact on physical and economic conditions.* The proposal must demonstrate to HUD the extent to which the project will have a substantial impact on the physical and economic development of the city or urban county;

(6) *Timeliness.* The proposal must demonstrate to HUD that the proposed activities are likely to be accomplished in a timely fashion with the grant amount available. (HUD expects projects to be completed within four years from the date of the announcement of preliminary funding approval); and

(7) *Demonstrated Performance.* The applicant has demonstrated performance in carrying out housing and community development programs. Performance shall be evaluated using such considerations as past compliance with HUD regulations and statutory requirements and progress in carrying out programs as planned.

(c) *Selection of projects for preliminary approval: Large cities and urban counties.* Projects shall be selected on the basis of the following point system:

(1) *Impaction (maximum value of 35 points).* The comparative degree of economic distress among applicants, as measured by combining the points from three factors:

(i) The percentage of the total housing stock that was built prior to 1940—up to 17 points;

(ii) The extent of poverty—up to 11 points; and

(iii) The population growth rate—up to 7 points;

(2) *Distress (maximum value of 35 points).* The comparative degree of economic deterioration in cities and urban counties, as measured by combining the points from three factors:

(i) Per capita income change—up to 15 points;

(ii) Unemployment rate—up to 15 points; and

(iii) Job lag/decline—up to 5 points;

(3) *Other criteria (maximum value of 33 points) and bonus points (maximum value of 2 points).* The factors contained in paragraphs (e) through (f) of this section.

(d) *Selection of projects for preliminary approval: Small cities.* Projects shall be selected on the following basis:

(1) *Impaction (maximum value of 35 points).* The comparative degree of economic distress among applicants, as measured by combining the points from three factors:

(i) The percentage of the total housing stock that was built prior to 1940—up to 17 points;

(ii) The extent of poverty—up to 11 points; and

(iii) The population growth rate—up to 7 points;

(2) *Distress (maximum value of 35 points).* The comparative degree of economic deterioration, as measured by combining the points from the following factors:

(i) Per capita income change—up to 18 points; and

(ii) Labor Surplus Area (LSA) unemployment rate—up to 17 points;

(3) *Other criteria (maximum value of 33 points) and bonus points (maximum value of 2 points).* The factors contained in paragraphs (e) through (f) of this section.

(e) *Other criteria (maximum value of 33 points).* In evaluating a proposed project, HUD will consider the following factors. The maximum point value for each factor is identified below:

(1) *Leveraging ratio* (10 points). The extent to which the grant will stimulate economic recovery by leveraging private investment;

(2) *New permanent jobs* (3 points). The number of new permanent jobs to be created;

(3) *UDAG funds per new permanent job* (7 points). The amount of action grant funds requested in relationship to the number of new permanent jobs;

(4) *Percent new low/moderate income jobs* (2 points). The percentage of new permanent jobs accessible to low/moderate income persons, including low/moderate income persons who are unemployed;

(5) *Percent of new minority jobs* (2 points). The percentage of new permanent jobs accessible to minorities, including minorities who are unemployed;

(6) *Retained jobs* (2 points). The number of jobs that will be lost without the provision of a UDAG award. Retained jobs will be measured by the number of jobs that were in existence before the start of the project and that are dependent upon the project for their continued existence as substantiated by firm evidence that if the project does not proceed, the jobs will be lost;

(7) *Pressing employment need* (1 point). Based upon the applicant's certification, HUD will assess whether the project will relieve the most pressing employment needs of the applicant by:

(i) Reemploying workers in a skill that has recently suffered a sharp increase in unemployment locally;

(ii) Retraining recently unemployed residents in new skills; or

(iii) Providing training to increase the local labor pool of skilled labor;

(8) *Pressing residential need* (1 point). HUD will assess whether the project will relieve a pressing housing need for low and moderate income persons in the jurisdiction by using the factors described in this paragraph (e)(8):

(i) The applicant certifies that the area has a severe shortage of housing for low and moderate income persons (this certification may affect the applicant's compliance with the new provisions under section 104(d) of the Housing and Community Development Act of 1974); and

(ii) The application proposes that:

(A) Not less than 51% of all funds available for the project will be used for dwelling units and related facilities; and

(B) Not less than 30% of all funds used for dwelling units and related facilities will be used for dwelling units to be occupied by persons of low and moderate income, or not less than 20% of all dwelling units made available to occupancy using such funds will be occupied by persons of low and moderate income, whichever results in the occupancy of more dwelling units by persons of low and moderate income;

(9) *Tax benefits per UDAG dollar* (2 points). The impact of the proposed project on the fiscal base of the community and the relationship to the amount of grant funds;

(10) *State/local funds per UDAG dollar* (2 points). The extent of assistance to be made available by State/local funds in relation to the amount of UDAG funds;

(11) *Federal Enterprise Zone Designation* (1 point). The project demonstrates special State/local economic incentives by being located within an enterprise zone designated in accordance with Title VII of the Housing and Community Development Act of 1987.

(f) *Bonus Points.* An applicant will be provided with bonus points as provided for below:

(1) An applicant that did not receive preliminary grant approval during the 12-month period preceding the date on which applications are required to be submitted for the grant competition involved shall be awarded 1 bonus point.

(2) An applicant that did not receive a preliminary grant approval during the 24-month period preceding the date on which applications are required to be submitted for the grant competition involved shall be awarded two bonus points.

(3) If an applicant has submitted and has pending more than one application, bonus points shall only be provided to the pending application which receives the highest number of points awarded under paragraph (e) of this section.

The following table summarizes the point system to be used by HUD in accordance with § 570.460(c)(1) in selecting projects for preliminary funding approval:

UDAG PROJECT SELECTION SYSTEM

Selection criteria for large cities, urban counties and small cities	Factors	Maximum points
A. Impaction	Pre-1940 Housing (17). Extent of Poverty (11) Population Growth Rate (7)	35
B. Distress		35
Large Cities and Urban Counties	*Small Cities*	
Per Capita Income Change (15). Unemployment rate (15) Job lag (5).	Per Capita Income Change (18) LSA Unemployment Rate (17)	
C. Other Criteria		33
	1. Leveraging ratio (10) 2. New Permanent Jobs (3) 3. UDAG funds per New Permanent Job (7) 4. Percent New Low/Moderate Income Jobs (2) 5. Percent New Minority Jobs (2) 6. Retained Jobs (2) 7. Pressing Employment Need (1) 8. Pressing Residential Need (1) 9. Tax Benefits per UDAG $ (2) 10. State/Local Funds per UDAG $ (2) 11. Federal Enterprise Zone Designation (1)	
D. Bonus Points		2

1. Applicant has not received a preliminary UDAG approval for one year (1)

or

2. Applicant has not received a preliminary UDAG approval for two years (2).

Total Possible Points 105

8. In § 570.460, paragraph (a) is revised, paragraphs (c)(1) through (c)(5) are redesignated as paragraphs (c)(4) through (c)(8), respectively, new paragraphs (c)(1) through (c)(3) are added, and paragraph (d) is removed, to read as follows:

§ 570.460 HUD review and action on applications:

(a) *Submission and review schedule.* The following chart indicates dates for submission of pre-application requests for determination of eligibility, the full application, HUD review and consultation with the applicant, the deadline for receipt of firm financial commitments, and the date by which the decision for preliminary approval is made. This schedule will remain in effect unless, within 30 days of the start of a fiscal year, the Secretary announces by **Federal Register** Notice a revised schedule applicable to the upcoming fiscal year. Public announcements of preliminary funding approvals will be made shortly after the decision date.

Determination of eligibility (preapplication SF-424 to be submitted by	Application submission period	Review period	Deadline for firm financial commitments [1]	Decision date
Large cities/Urban counties:				
Sept. 30	Nov. 1-30	Dec. 1-Jan. 31	Jan. 15	Jan. 31
Jan. 31	Mar. 1-31	Apr. 1-May 31	May 15	May 31.
May 31	July 1-31	Aug. 1-Sept. 30	Sept. 15	Sept. 30.
Small cities:				
Nov. 30	Jan. 1-31	Feb. 1-Mar. 31	Mar. 15	Mar. 31.
Mar. 31	May 1-31	June 1-July 31	July 15	July 31.
July 31	Sept. 1-30	Oct. 1-Nov. 30	Nov. 15	Nov. 30

[1] If, in a particular month a deadline falls on a weekend, the deadline is carried over to the following Monday. If the deadline falls on a Federal holiday, it is carried over to the next business day.

(1) * * *

* * * * *

(c) *Central office action on applications.* (1) Preliminary approval decisions will be made by HUD Central Office utilizing the point system described in § 570.459. Central Office funding decisions for distressed cities and urban counties will be based upon a funding formula for grants which, to the extent practicable, will make 65% of funds available for projects based upon points received for all the criteria and 35% of funds available for projects based only on other criteria and bonus points, as described in § 570.459 (e) and (f). Applications for Pockets of Poverty are selected separately from distressed cities and urban counties. Applicable criteria for Pockets of Poverty are found in § 570.466.

(2) The funds for the competition are to be an amount approximately equal to the amount of appropriated funds available, divided by the number of scheduled competitions, plus available carry-overs and recaptures.

(3) For Fiscal Years 1988 and 1989, the maximum grant amount for any project is $10,000,000.

* * * * *

9. In § 570.461, paragraph (e) is revised to read as follows:

§ 570.461 Post preliminary approval requirements.

* * * * *

(e) *Program Income.* Notwithstanding any other provisions of this part and unless otherwise provided in the grant agreement, program income received by the Recipient under this Subpart before the completion of construction of all action grant funded activities shall be used to reimburse costs incurred for the Recipient activities. Such income shall be used instead of any draw under the letter of credit to the extent adequate to reimburse costs so incurred except as otherwise provided in the grant agreement. Program income received before project closeout shall be spent for activities eligible under Title I of the Housing and Community Development Act of 1974 and shall be spent in accordance with 24 CFR Part 570. Upon project closeout all program income shall be made available by the Recipient for economic development activities that are eligible for funding under the Urban Development Action Grant program or section 105 of the Housing and Community Development Act of 1974. These funds are to be considered miscellaneous revenues and shall not be governed by 24 CFR Part 570. The Recipient shall provide the Secretary with a statement of the use of repaid grant funds during the most recent full fiscal year and projected receipt and use of repaid grant funds for the following fiscal year of this applicant.

* * * * *

Date: August 20, 1988.

Jack R. Stokvis,

Assistant Secretary for Community Planning and Development.

[FR Doc. 88-19581 Filed 8-26-88; 8:45 am]

BILLING CODE 4210-29-M

33033

federal register

Monday
August 29, 1988

Part IX

International Trade Commission

19 CFR Parts 206, 207, 210, and 211
Investigations; Domestic Industries; Unfair Practices in Import Trade; Interim Rules With Request for Comments

INTERNATIONAL TRADE COMMISSION

19 CFR Part 206

Investigations Relating To Import Injury to Industries, Market Disruption, and Review of Relief Actions

AGENCY: International Trade Commission.

ACTION: Interim rules with request for comments.

SUMMARY: The Commission is revising Part 206 on an interim basis to conform its rules to amendments to sections 201 and 406 of the Trade Act of 1974 made by the Omnibus Trade and Competitiveness Act of 1988. The Commission has adopted interim rules because the amendments in the 1988 act were effective on the date of enactment. In addition, the Commission seeks public comment on these interim rules prior to issuing final rules.

In the 1988 act Congress rewrote section 201 in its entirety and amended section 406 in several respects. Among other things, new section 201 provides for the submission of industry adjustment plans and commitments, for Commission determinations concerning critical circumstances, and for interim relief for industries producing perishable agricultural products; includes new or reviewed factors to be considered in determining serious injury or threat of serious injury; and establishes new time limits for making determinations and issuing reports. Amended section 406 includes, among other things, several provisions that clarify statutory criteria. Because of the number of changes, the Part 206 rules have been revised.

DATES: The interim rules are effective on August 23, 1988, except that they shall not apply to any investigations commenced before that date. Comments on the interim rules will be considered if received on or before October 28, 1988.

ADDRESS: A signed original and 14 copies of each set of comments, along with a cover letter addressed Kenneth R. Mason, Secretary, should be sent to the U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: William W. Gearhart, Esq., Assistant General Counsel, U.S. International Trade Commission, telephone 202-252-1091.

SUPPLEMENTARY INFORMATION: Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties.

On August 23, 1988, the Omnibus Trade and Competitiveness Act of 1988 ("the 1988 Act") became effective. The 1988 Act contains provisions which, *inter alia,* amend sections 201 and 406 of the Trade Act of 1974 (19 U.S.C. 2251, 2436). The Commission's rules concerning practice and procedure in regard to these provisions need to be amended to conform to the new legislation. The 1988 Act, *inter alia,* also amended the antidumping and countervailing duty provisions of the Tariff Act of 1930 (19 U.S.C. 1671 *et seq.*) and section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). Interim rules amending Parts 207, 210, and 211 of 19 CFR, Chapter II, to reflect the amendments to those provisions are being published elsewhere in this issue of the **Federal Register.**

Commission rules to implement new legislation ordinarily are promulgated in accordance with the rulemaking provisions of section 553 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA), which requires the following steps: (1) Publication of a notice of proposed rule making; (2) solicitation of public comment on the proposed rules; (3) Commission review of such comments prior to developing final rules; and (4) publication of the final rules 30 days prior to their effective date. *See* 5 U.S.C. 553. That procedure could not be utilized in this instance because the new legislation became effective upon enactment, and it was not possible to complete the procedure prior to the effective date of the new legislation.

The Commission thus determined to adopt *interim* rules that would go into effect when the new legislation was enacted and would remain in effect until the Commission could adopt final rules promulgated in accordance with the usual notice, comment, and advance publication procedure.

The Commission's authority to adopt interim rules without following all steps listed in section 553 of the APA is derived from two sources: (1) Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335), and (2) provisions of section 553 of the APA which allow an agency to dispense with various steps in the prescribed rulemaking procedure under certain circumstances.

Section 335 of the Tariff Act of 1930 authorizes the Commission "to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." 19 U.S.C. 1335. The Commission determined that the need for interim rules is clear in this instance. The Commission noted that the new legislation alters practice and procedure in important respects with respect to sections 201 and 406 and that some existing Commission rules either do not anticipate the new legislation or will be in conflict with it. The Commission found that rulemaking was essential for the orderly administration of the two provisions as amended by the new legislation. Furthermore, since the legislation became effective immediately upon enactment, the Commission concluded that it was imperative that implementing Commission rules be in place on the enactment date of the new statute.

The Commission noted that an agency may dispense with publication of a notice of proposed rule making when the following circumstances exist: (1) The proposed rules are interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; or (2) the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, and that finding (and the reasons therefor) are incorporated into the rules adopted by the agency. 5 U.S.C. 553(b). An agency may also dispense with the publication of a notice of final rules thirty days prior to their effective date if (1) the rules are interpretive rules or statements of policy or (2) the agency finds that "good cause" exists for not meeting the advance publication requirement and that finding is published along with the rule. 5 U.S.C. 553(d)(3).

In this instance, the Commission determined that the requisite circumstances existed for dispensing with the notice, comment, and advance publication procedure that ordinarily precedes the adoption of Commission rules. For purposes of invoking the section 553(b) exemption from publishing a notice of proposed rule making which solicits public comment, the Commission found that (1) the interim rules are "agency rules of procedure or practice"; and (2) since the new legislation would become effective upon enactment, it clearly would be "impracticable" for the Commission to comply with the usual notice, comment, and advance publication procedure. For the purpose of invoking the section 553(d)(3) exemption from publishing advance notice of the interim rules 30 days prior to their effective date, the Commission found that the fact that the new legislation was effective upon enactment made such advance publication impossible and constituted "good cause" for the Commission not to comply with that requirement.

The Commission recognizes that interim regulations should not respond to anything more than the exigencies created by the new legislation and expects that the more comprehensive final rules to follow will emerge as a result of the Congressionally mandated policy of affording public participation in the rulemaking process.[1] Having been promulgated in reponse to exigencies created by the new legislation, each interim rule accordingly comes under one or more of the following categories: (1) Revision of an pre-existing rule that conflicted with the new legislation; (2) a technical amendment to make a pre-existing rule conform to the language or subsection designations of the new legislation; (3) a cross-reference to an interim rule which was added to an otherwise unamended pre-existing rule to achieve intra-part consistency and to avoid confusion about how the unamended provisions of the rule are to be applied in light of the interim rule provisions concerning the same subject matter; (4) reorganization or rewording of a pre-existing rule to avoid confusion about how the rule is to be applied in light of the new legislation; or (5) a new rule covering a matter provided for in the new legislation but not covered by a pre-existing rule. More comprehensive final rules will be issued at a later date in accordance with the usual notice, public comment, and advance publication procedure.

The Commission has determined that these amendments do not constitute a major rule for the purposes of Executive Order 12291 (46 FR 13193, Feb. 17, 1981) because they do not meet the criteria described in section 1(b) of the EO. Moreover, the amendments, as interim rules, are not subject to the filing requirement of section 3(c)(3) of the EO.

Explanation of Interim Amendments to 19 CFR Part 206

The amendments set forth below are intended to reflect amendments to §§ 201 and 406 of the Trade Act of 1974 effected by the 1988 act. In the 1988 act Congress rewrote the sections 201–203 import relief provisions of the Trade Act of 1974 in their entirety. The new provisions are set forth in sections 201–204 of the Trade Act of 1974, as amended. The 1988 act amended section 406 of the Trade Act but did not rewrite it in its entirety. References below the Trade Act and to sections thereof are to the Trade Act of 1974, as amended by the 1988 act.

Except as noted, the interim rules are similar in substance to the previous rules but have been rewritten in their entirety and renumbered largely to reflect numerous changes in statutory citations, additional information to be furnished in petitions relevant to the question of injury, new Commission findings with regard to critical circumstances and perishable agricultural products, and new Commission responsibilities with regard to the monitoring of relief, advising the President as to the effect of modification or termination of relief, and evaluating the effectiveness of recently terminated relief.

Sections 206.1 through 206.6 are rules of general applicability to this Part 206.

Section 206.1 is amended to refer to the new statutory provisions in the Trade Act as well as to delete references to the Trade Expansion Act of 1962, the predecessor statute to the 1974 Trade Act (which for the most part was repealed in 1975 when the 1974 Trade Act was originally enacted), under which the Commission no longer performs functions in this regard.

Section 206.2 would similarly be amended to reflect changes in statutory authority.

Section 206.3 is amended to effect minor editorial changes.

Section 206.4 is amended to reflect the fact that the Comission is required to transmit copies of petitions to the U.S. Trade Representative (rather than the Special Representative for Trade Negotiations).

Section 206.5 is amended to reflect the fact that separate Commission hearings will be required for the issues of injury and remedy (if necessary) and to invite public comment on the petitioner's adjustment plan, if one is submitted.

Section 206.6 amended to reflect changes in statutory citations and the findings and information that new section 204 of the Trade Act requires that the Commission furnish with its report to the President.

Sections 206.11 through 206.17 pertain to Commission investigations under title II of the Trade Act of 1974 with respect to relief from import competition.

Section 206.11 is similar to old § 206.7, except that it reflects changes in statutory citations.

Section 206.12 defines the terms "adjustment plan", "commitments", "critical circumstances", and "perishable agricultural product". These are terms newly used in the escape clause law, and the Commission definitions closely track definitions set forth in the statutory provisions.

Section 206.13(a) and (b) closely parallel old § 206.8, and new subsection (c) reflects the statutory prerequisites for filing a petition that requests provisional relief with respect to a perishable agricultural product.

Section 206.14 parallels the petition contents requirements of old § 206.9 and, in addition, requires that petitioner notify the Commission in the petition, when appropriate, as to whether petitioner is alleging critical circumstances or is seeking temporary relief with regard to a perishable agricultural product; that petitioner indicate the percent of domestic production that it accounts for and basis for asserting that it is representative of an industry; and that petitioner provide certain additional data relating to additional economic factors that the Commission is required to consider in determining whether a domestic industry is seriously injured or threatened with serious injury.

Section 206.15 reflects statutory provisions relating to the submission to the Commission of industry adjustment plans and commitments by firms, workers, communities, trade associations, and other interested persons.

Section 206.16 parallels the time for reporting provision of old § 206.10 and, in addition, indicates Commission statutory deadlines for making findings, with respect to injury and remedy, parishable agricultural products, and critical circumstances.

Section 206.17 parallels the public report provision of old § 206.11.

Section 206.21 through 206.26 pertain to Commission investigations under title IV of the Trade Act of 1974 with regard to market disruption.

Section 206.21 is unchanged from old § 206.12.

Section 206.22 parallels old § 206.13 without substantive change.

Sections 206.23 is substantially the same as old § 206.14, except that it requires submission of certain data in petitions relating to additional economic factors that the Commission must consider in determining whether market disruption exists and certain information relating to the question of whether petitioner is representative of an industry.

Sections 206.24 and 206.25, which relate to time for reporting and public reports, respectively, are the same as old §§ 206.15 and 206.16.

Sections 206.31 through 206.34 pertain to Commission investigations under section 204 of the Trade Act of 1974 with respect to monitoring of imports subject to relief and advice to the President concerning the probable economic effect of extension, reduction, modification, or termination of relief actions.

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[1] *See American Federation of Government Employees, AFL–CIO v. Block,* 655 F.2d 1153, 1157–1158 (D.C. Cir. 1981). *See also United States v. Garner,* 767 F.2d 104, 120 (5th Cir. 1985) (quoting *American Federation of Government Employees, AFL–CIO v. Block*).

Section 206.31 states that the rules in this Subpart C pertain to Commission investigations under section 204 of the Trade Act.

Section 206.32 states that the Commission will monitor developments in the domestic industry for the duration of a relief action and will submit biannual reports to the President and the Congress on the results of that monitoring.

Section 206.33 states that the Commission, upon the request of the President, will conduct investigations for the purpose of gathering information in order that it might advise the President of its judgment as to the probable economic effect on the industry concerned of any extension, reduction, modification, or termination of a relief action.

Section 206.34 states that the Commission will conduct investigations to evaluate the effectiveness of relief after the termination of a relief action.

List of Subjects in 19 CFR Part 206

Administrative practice and procedure, Investigations, Imports.

19 CFR Chapter II is amended by revising Part 206 to read as follows:

PART 206—INVESTIGATIONS RELATING TO IMPORT INJURY TO INDUSTRIES, MARKET DISRUPTION, AND REVIEW OF RELIEF ACTIONS

Sec.
206.1 Applicability of part.

Subpart A—General

206.2 Identification of type of petition.
206.3 Institution of investigations.
206.4 Notification of other agencies.
206.5 Public hearing.
206.6 Report to the President.

Subpart B—Investigations for Relief From Import Competition

206.11 Applicability of subpart.
206.12 Definitions applicable to Subpart B.
206.13 Who may file a petition.
206.14 Contents of petition.
206.15 Industry adjustment plan and commitments.
206.16 Time for determinations, reporting.
206.17 Public report.

Subpart C—Investigations for Relief From Market Disruption

206.21 Applicability of subpart.
206.22 Who may file a petition.
206.23 Contents of petition.
206.24 Time for reporting.
206.25 Public report.

Subpart D—Monitoring; Advice As to Effect of Extension, Reduction, Modification, or Termination of Relief Action

206.31 Applicability of subpart.
206.32 Monitoring.
206.33 Investigations to advise the President as to the probable economic effect of extension, reduction, modification, or termination of action.
206.34 Investigations to evaluate the effectiveness of relief.

Authority: Sec. 335, Tariff Act 1930 (72 Stat. 680; 19 U.S.C. 1335); Sec. 603, Trade Act of 1974 (88 Stat. 2073; 19 U.S.C. 2482).

§ 206.1 Applicability of part.

This Part 206 applies specifically to functions and duties of the Commission under sections 201–202, 204, and 406 of the Trade Act of 1974, as amended (19 U.S.C. 2251 *et seq.*, 2436) (hereinafter Trade Act). For other rules of general applications see Part 201 of this chapter. Subpart A of this part sets forth rules generally aplicable to investigations conducted under these provisions of the Trade Act. Each of Subparts B and C of this part sets forth rules specifically applicable to petitions and investigations under sections 202 and 406, respectively, of the Trade Act. Subpart D of this part sets forth rules specifically applicable to functions and duties under section 204 of the Trade Act.

Subpart A—General

§ 206.2 Identification of type of petition.

Each petition under this Part 206 shall state clearly on the first page thereof "This is a petition under section (202 or 406, as the case may be) of the Trade Act of 1974 and Subpart (B or C, as the case may be) of Part 206 of the rules of practice and procedure of the United States International Trade Commission".

§ 206.3 Institution of investigations.

Promptly after the receipt of a petition under this Part 206, properly filed, the Commission will institute an appropriate investigation and will cause a notice thereof to be published in the **Federal Register**.

§ 206.4 Notification of other agencies.

The Commission will promptly transmit copies of petitions filed and notification of investigations instituted to the Office of the United States Trade Representative (hereinafter USTR), the Secretary of Commerce, the Secretary of Labor, and other Federal agencies directly concerned.

§ 206.5 Public hearings.

Public hearings on the subject of injury and remedy (if necessary) will be held in connection with each investigation instituted under this part after reasonable notice thereof has been caused to be published in the **Federal Register**. All interested parties and consumers will be afforded an opportunity to be present, to present evidence, to comment on the adjustment plan, if any, submitted in the case of an investigation under section 202(b), and to be heard at such hearings. A hearing on remedy will not be held if the Commission has made a negative determination on the question of injury.

§ 206.6 Report to the President.

The Commission will include in its report to the President the following:

(a) The determination with respect to whether the criteria for relief provided in section 202(b) or section 406(a)(1) of the Trade Act, as the case may be, have been satisfied, and an explanation of the basis for the determination;

(b) If the determination under section 202(b) or section 406(a)(1) is affirmative, the recommendations for action and an explanation of the basis for each recommendation;

(c) Any dissenting or separate views by members of the Commission regarding the determination and any recommendations;

(d) In the case of a determination made under section 202(b):

(1) The findings with respect to the results of an examination of the factors other than imports which may be a cause of serious injury or threat thereof to the domestic industry;

(2) A copy of the adjustment plan, if any, submitted by the petitioner;

(3) Commitments submitted and information obtained by the Commission regarding steps that firms and workers in the domestic industry are taking, or plan to take, to facilitate positive adjustment to import competition;

(4) A description of the short- and long-term effects that implementation of the action recommended is likely to have on the petitioning domestic industry, other domestic industries, and consumers; and

(5) A description of the short- and long-term effects of not taking the recommended action on the petitioning domestic industry, its workers and communities where production facilities of such industry are located, and other domestic industries.

Subpart B—Investigations for Relief from Import Competition

§ 206.11 Applicability of subpart.

This Subpart B applies specifically to investigations under section 202(b) of the Trade Act. For other applicable rules, see Subpart A of this part and Part 201 of this chapter.

§ 206.12 Definitions applicable to Subpart B.

For the purposes of this part, the following terms have the meanings hereby assigned to them:

(a) *Adjustment plan* means a plan to facilitate positive adjustment to import competition submitted by a petitioner to the Commission and USTR either with the petition or an any time within 120 days after the date of filing of the petition.

(b) *Commitment* means commitments that a firm in the domestic industry, a certified or recognized union or group of workers in the domestic industry, a local community, a trade association representing the domestic industry, or any other person or group of persons submits to the Commission regarding actions such persons and entities intend to take to facilitate positive adjustment to import competition;

(c) *Critical circumstances* mean such circumstances as are described in section 202(b)(3)(B) of the Trade Act;

(d) *Perishable agricultural product* means any agricultural article, including livestock, for which the USTR considers action to be appropriate after taking into account the factors set forth in section 202(d)(5)(A) of the Trade Act.

§ 206.13 Who may file a petition.

(a) *In general.* A petition under this Subpart B may be filed by an entity, including a trade association, firm, certified or recognized union, or group of workers, that is representative of a domestic industry producing an article like or directly competitive with a foreign article that is allegedly being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to such domestic industry.

(b) *Reinvestigation within 1 year.* Except for good cause determined by the Commission to exist, no investigation for the purposes of section 202 of the Trade Act shall be made with respect to the same subject matter as a previous investigation under this section unless 1 year has elaped since the Commission made its report to the President of the results of such previous investigation.

(c) *Perishable agricultural product.* An entity of the type described in (a) of this section that represents a domestic industry producing a perishable agricultural product may petition for provisional relief with respect to such product only if it has previously filed a request with USTR for the monitoring of imports of that product, USTR has requested that the Commission monitor and investigate imports of such product, and such product has been subject to monitoring by the Commission for not less than 90 days as of the date the allegation of injury is included in the petition.

§ 206.14 Contents of petition

A petition under this Subpart B shall include specific information in support of the claim that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article. Such petition shall state whether *critical circumstances* are alleged and whether provisional relief is sought because the imported article is a *perishable agricultural product.* In addition, such petition shall, to the extent practicable, include the following information:

(a) *Product description.* The name and description of the imported article concerned, specifying the United States tariff provision under which such article is classified and the current tariff treatment thereof, and the name and description of the like or directly competitive domestic article concerned;

(b) *Representativeness.* (1) The names and addresses of the firms represented in the petition and/or the firms employing or previously employing the workers represented in the petition and the locations of their establishments in which the domestic article is produced; (2) the percentage of domestic production of the like or directly competitive domestic article that such represented firms and/or workers account for and basis for claiming that such firms and/or workers are representative of an industry; and (3) the names and locations of all other producers of the domestic article known to the petitioner;

(c) *Import data.* Import data for at least each of the most recent 5 full years which form the basis of the claim that the article concerned is being imported in increased quantities, either actual or relative to domestic production;

(d) *Domestic production data.* Data on total U.S. production of the domestic article for each full year for which data are provided pursuant to paragraph (c) of this section;

(e) *Data showing injury.* Quantitative data indicating the nature and extent of injury to the domestic industry concerned:

(1) With respect to serious injury, data indicating:

(i) A significant idling of production facilities in the industry, including data indicating plant closings or the underutilization of production capacity;

(ii) The inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit; and

(iii) Significant unemployment or underemployment within the industry; and/or

(2) With respect to the threat of serious injury, data relating to:

(i) A decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, or employment (or increasing underemployment);

(ii) The extent to which firms in the industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development; and

(iii) The extent to which the U.S. market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets;

(f) *Cause of injury.* An enumeration and description of the causes believed to be resulting in the injury, or threat thereof, described under paragraph (e) of this section, and a statement regarding the extent to which increased imports, either actual or relative to domestic production, of the imported article are believed to be such a cause, supported by pertinent data;

(g) *Relief sought and purpose thereof.* A statement describing the import relief sought, including the type, amount, and duration, and the specific purposes therefor, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition;

(h) *Efforts to compete.* A statement on the efforts being taken, or planned to be taken, or both, by firms and workers in the industry to make a positive adjustment to import competition.

§ 206.15 Industry adjustment plan and commitments.

(a) *Adjustment plan.* A petitioner may submit to the Commission, either with the petition or at any time within 120 days after the date of filing of the petition, a plan to facilitate positive adjustment to import competition.

(b) *Commitments.* If the Commission makes an affirmative injury determination, any firm in the domestic industry, certified or recognized union or group of workers in the domestic industry, local community, trade association representing the domestic industry, or any other person or group of persons may, individually, submit to the Commission commitments regarding actions such persons and entities intend to take to facilitate positive adjustment to import competition.

§ 206.16 Time for determinations, reporting.

(a) *In general.* The Commission will make its determination with respect to injury within 120 days after the date on which the petition is filed, the request or resolution is received, or the motion is adopted, as the case may be, except that if the Commission determines before the 100th day that the investigation is extraordinarily complicated, the Commission will make its determination within 150 days. The Commission will make its report to the President at the earliest practicable time, but not later than 180 days after the date on which the petition is filed, the request or resolution is received, or the motion is adopted, as the case may be.

(b) *Perishable agricultural product.* In the case of a request in a petition for provisional relief with respect to a perishable agricultural product that has been the subject of monitoring by the Commission, the Commission will report its determination and any finding to the President not later than 21 days after the date on which the request for provisional relief is received.

(c) *Critical circumstances.* If petitioner alleges the existence of critical circumstances in the petition or on or before the 90th day after the day on which the petition was filed, the Commission will report its determination regarding such allegation and any finding on or before the 120th day after such filing date. In the event petitioner alleges such circumstances after the 90th day and on or before the 150th day after such filing date, the Commission will report its determination regarding such allegation and any finding on or before the date its report is submitted to the President.

§ 206.17 Public report.

Upon making a report to the President of the results of an investigation to which the Subpart B relates, the Commission will make such report public (with the exception of information which the Commission determines to be confidential) and cause a summary thereof to be published in the **Federal Register**.

Subpart C—Investigations for Relief from Market Disruption

§ 206.21 Applicability of subpart.

This Subpart C applies specifically to investigations under section 406(a) of the Trade Act. For other applicable rules, see Subpart A of this part and Part 201 of this chapter.

§ 206.22 Who may file a petition.

A petition under this Subpart C may be filed by an entity, including a trade association, firm, certified or recognized union, or group of workers, that is representative of a domestic industry producing an article with respect to which there are imports of a like or directly competitive article which is the product of a Communist country, which imports, allegedly, are increasing rapidly, either absolutely or relative to domestic production, so as to be a significant cause of a material injury, or the threat thereof, to such domestic industry.

§ 206.23 Contents of petition

A petition under this Subpart C shall include specific information in support of the claim that imports of an article the product of a Communist country which are like or directly competitive with an article produced by a domestic industry, are increasing rapidly, either absolutely or relative to domestic production, so as to be a significant cause of material injury, or the threat thereof, to such domestic industry. In addition, such petition shall, to the extent practicable, include the following information:

(a) *Product description.* The name and description of the imported article concerned, specifying the United States tariff provision under which such article is classified and the current tariff treatment thereof, and the name and description of the like or directly competitive domestic article concerned;

(b) *Representativeness.* (1) The names and addresses of the firms represented in the petition and/or the firms employing or previously employing the workers represented in the petition and the locations of their establishments in which the domestic article is produced; (2) the percentage of domestic production of the like or directly competitive domestic article that such represented firms and/or workers account for and the basis for asserting that petitioner is representative of an industry; and (3) the names and locations of all other producers of the domestic article known to the petitioner;

(c) *Import data.* Import data for at least each of the most recent 5 full years which form the basis of the claim that imports from a Communist country of an article like or directly competitive with the article produced by the domestic industry concerned are increasing rapidly, either absolutely or relative to domestic production;

(d) *Domestic production data.* Data on total U.S. production of the domestic article for each full year for which data are provided pursuant to subsection (c) of this section;

(e) *Data showing injury.* Quantitative data indicating the nature and extent of injury to the domestic industry concerned:

(1) With respect to material injury, data indicating:

(i) An idling of production facilities in the industry, including data indicating plant closings or the underutilization of production capacity;

(ii) The inability of a number of firms to carry out domestic production operations at a reasonable level of profit; and

(iii) Unemployment or underemployment within the industry; and/or

(2) With respect to the threat of material injury, data relating to:

(i) A decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, or employment (or increasing underemployment);

(ii) The extent to which firms in the industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development; and

(iii) The extent to which the U.S. market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets;

(f) *Cause of injury.* An enumeration and description of the causes believed to be resulting in the material injury, or threat thereof, described in paragraph (e) of this section; information relating to the effect of imports of the subject merchandise on prices in the United States for like or directly competitive articles; evidence of disruptive pricing practices, or other efforts to unfairly manage trade patterns; and a statement regarding the extent to which increased imports, either actual or relative to domestic production, of the imported article are believed to be such a cause, supported by pertinent data;

(g) *Relief sought and purpose thereof.* A statement describing the import relief sought.

§ 206.24 Time for reporting.

The Commission will make its report to the President at the earliest practical time, but not later than 3 months after the date on which the petition is filed, the request or resolution is received, or the motion is adopted, as the case may be.

§ 206.25 Public report.

Upon making a report to the President of the results of an investigation to which the Subpart C relates, the Commission will make such report public (with the exception of information which the Commission determines to be confidential) and cause a summary thereof to be published in the **Federal Register**.

Subpart D—Monitoring; Advice As to Effect of Extension, Reduction, Modification, or Termination of Relief Action

§ 206.31 Applicability of subpart.

This Subpart D applies specifically to investigations under section 204 of the Trade Act. For other applicable rules, see Subpart A of this part and Part 201 of this chapter.

§ 206.32 Monitoring.

(a) *In general.* As long as any import relief imposed by the President pursuant to section 203 of the Trade Act remains in effect, the Commission will monitor developments with respect to the domestic industry, including the progress and specific efforts made by workers and firms in the industry to make a positive adjustment to import competition.

(b) *Biannual reports.* The Commission will submit a report on the results of the monitoring to the President and the Congress not later than (1) the 2nd anniversary of the day on which the action under section 203 of the Trade Act first took effect, and (2) the last day of each 2-year period occurring after such first report. In the course of preparing each such report, the Commission will hold a hearing at which interested persons will be given a reasonable opportunity to be present, to produce evidence, and to be heard.

§ 206.33 Investigations to advise the President as to the probable economic effect of extension, reduction, modification, or termination of action.

Upon the request of the President, the Commission will conduct an investigation for the purpose of gathering information in order that it might advise the President of its judgment as to the probable economic effect on the industry concerned of any extension, reduction, modification, or termination of the action taken under section 203 which is under consideration.

§ 206.34 Investigations to evaluate the effectiveness of relief.

(a) *Investigation.* After any action taken under section 203 has terminated, the Commission will conduct an investigation for the purpose of evaluating the effectiveness of the relief action in facilitating positive adjustment by the domestic industry to import competition, consistent with the reasons set out by the President in the report submitted to the Congress under section 203(b).

(b) *Hearing.* In the course of such investigation, the Commission will hold a hearing at which interested persons will be given an opportunity to be present, to produce evidence, and to be heard.

(c) *Time for reporting.* The Commission will submit its report to the President and to the Congress by no later than the 180th day after the day on which the action terminated.

By order of the Commission.

Issued: August 24, 1988.

Kenneth R. Mason,

Secretary.

[FR Doc. 88-19634 Filed 8-26-88; 8:45 am]

BILLING CODE 7020-02-M

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19 CFR Part 207

Investigations of Whether Injury to Domestic Industries Results from Imports Sold at Less Than Fair Value or from Subsidized Exports to the United States

AGENCY: U.S. International Trade Commission.

ACTION: Interim rules and request for comments.

SUMMARY: The Commission is amending Part 207 on an interim basis to conform with the Omnibus Trade and Competitiveness Act of 1988, which became effective on August 23, 1988.

The amendments to Part 207 provide, in particular, for certification by submitters of factual information that such information is accurate; changes in the procedure for release of business proprietary (formerly confidential business) information under administrative protective order; strengthening sanctions for breach of protective order; more detailed filing of critical circumstances allegations; deletion of provisions incompatible with the new law; and procedures in proceedings for the establishment of short life cycle product categories.

DATES: The interim rules are effective on August 23, 1988. Comments on the interim rules will be considered if received on or before October 28, 1988.

ADDRESSES: A signed original and 14 copies of each set of comments, along with a cover letter addressed to Kenneth R. Mason, Secretary, should be sent to the U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: Paul R. Bardos, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-252-1102.

SUPPLEMENTARY INFORMATION: Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties.

On August 23, 1988, the Omnibus Trade and Competitiveness Act of 1988 ("the 1988 Act") became effective. This new trade legislation contains provisions which, *inter alia*, amend Title VII of the Tariff Act of 1930 (19 U.S.C. 1671 *et seq.*). The Commission's rules concerning Title VII practice and procedure need to be amended to conform to the new legislation. The 1988 Act, *inter alia*, also amends other parts of the Tariff Act of 1930 and the import relief and market disruption provisions of the Trade Act of 1974 (19 U.S.C. 2251, 2436). Interim rules amending Parts 206, 210, and 211 of 19 CFR, Chapter II to reflect the amendments to those provisions are being published elsewhere in this issue of the **Federal Register**.

Commission rules to implement new legislation ordinarily are promulgated in accordance with the rule making provisions of section 553 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). (APA), which entails the following steps: (1) Publication of a notice of proposed rule making; (2) solicitation of public comment on the proposed rules; (3) Commission review of such comments prior to developing final rules; and (4) publication of the final rules thirty days prior to their effective date. *See* 5 U.S.C. 553. That procedure could not be utilized in this instance because the new legislation became effective upon enactment, and it was not possible to complete the procedure *prior* to the effective date of the new legislation.

The Commission thus determined to adopt *interim* rules that will go into effect when the new legislation is enacted and will remain in effect until the Commission can adopt final rules promulgated in accordance with the usual notice, comment, and advance publication procedure.

The Commission's authority to adopt interim rules without following all steps listed in section 553 of the APA is derived from two sources: (1) Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) and (2) provisions of section 553 of the APA which allow an agency to dispense with various steps in the prescribed rule making procedure under certain circumstances.

Section 335 of the Tariff Act of 1930 authorizes the Commission "to adopt reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." 19 U.S.C. 1335. The Commission determined that the need for interim rules is clear in this instance. The Commission noted that the new legislation alters Title VII practice and procedure in important respects and that some existing Commission rules would be in conflict with the new legislation. The Commission found that rule making was essential for the orderly administration of Title VII as amended by the new legislation. Furthermore, since the legislation became effective immediately upon enactment, the Commission concluded that it was imperative that implementing rules be in place on the enactment date of the new statute.

The Commission noted that an agency may dispense with publication of a notice of proposed rule making when the following circumstances exist: (1) The proposed rules are interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or (2) the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, and that finding (and the reasons therefor) are incorporated into the rules adopted by the agency. 5 U.S.C. 553(b). An agency may also dispense with the publication of a notice of final rules thirty days prior to their effective date if (1) the rules are interpretive rules or statements of policy or (2) the agency finds that "good cause" exists for not meeting the advance publication requirement and that finding is published along with the rule. 5 U.S.C. 553(d)(3).

In this instance, the Commission determined that the requisite circumstances existed for dispensing with the notice, comment, and advance publication procedure that ordinarily precedes the adoption of Commission rules. For purposes of invoking the section 553(b) exemption from publishing a notice of proposed rule making which solicits public comment, the Commission found that (1) the interim rules are "agency rules of procedure or practice"; and (2) since the new legislation would become effective upon enactment, it clearly would be "impracticable" for the Commission to comply with the usual notice, comment, and advance publication procedure. The Commission found that it could not predict when or if the new legislation would pass and therefore could not predict the effective date. For the purpose of invoking the section 553(d)(3) exemption from publishing advance notice of the interim rules thirty days prior to their effective date, the Commission found that the fact that the new legislation was effective upon enactment made such advance publication impossible and constituted "good cause" for the Commission not to comply with that requirement.

The Commission recognizes that interim regulations should not respond to anything more than the exigencies created by the new legislation and expects that the more comprehensive final rules to follow will emerge as a result of the Congressionally-mandated policy of affording public participation in the rule making process.[1] Having been promulgated in response to exigencies created by the new legislation, each interim rule accordingly comes under one or more of the following categories: (1) Revision of a pre-existing rule that conflicted with the new legislation; (2) a technical amendment to make a pre-existing rule conform to the language or subsection designations of the new legislation; (3) a cross-reference to an interim rule which was added to an otherwise unamended pre-existing rule to achieve intra-Part consistency and to avoid confusion about how the unamended provisions of the rule are to be applied in light of the interim rule provisions concerning the same subject matter; (4) reorganization or rewording of a pre-existing rule to avoid confusion about how the rule is to be applied in light of the new legislation; or (5) a new rule covering a matter provided for in the new legislation but not covered by a pre-existing rule. More comprehensive final rules will be issued at a later date in accordance with the usual notice, public comment, and advance publication procedure.

The Commission has determined that these amendments do not constitute a major rule for the purposes of Executive Order 12291 (46 FR 13193, February 17, 1981) because they do not meet the criteria described in section 1(b) of the EO. Moreover, the amendments, as interim rules, are not subject to the filing requirement of section 3(c)(3) of the EO.

Explanation of the Interim Amendments to 19 CFR Part 207

The amendments set forth below are intended to reflect changes in the law effected by the 1988 Act.

Section 207.2 is amended to remove paragraph (h) which defines the term "interested party." Because the statute as amended defines the term and the definition in § 207.2(h) does not conform to the statute, paragraph (h) is removed as unnecessary and obsolete. Paragraph (i), which defines the term "record", is redesignated paragraph (h) accordingly.

Section 207.3 is amended to require that any interested party submitting factual information and any person submitting a response to a Commission questionnaire must certify that such information is accurate and complete to the best of the submitter's knowledge. This change implements a provision in the 1988 Act and applies only to investigations instituted after the effective date of the 1988 Act.

Section 207.7 is amended to modify the procedure for obtaining confidential business information, now termed business proprietary information, under administrative protective orders. The amended rule applies to all investigations instituted after the effective date of the 1988 Act. In the case of an investigation in which the preliminary phase was instituted before the effective date but the final phase is instituted after the effective date, business proprietary information received by the Commission during the prelimianry phase will not be disclosed under protective order, except if such information is separately gathered by the Commission in the final phase. Sanctions for breach of protective order are strengthened by adding the sanctions of (1) public release of the business proprietary information submitted by the breaching party, and (2) denial of access to business proprietary information in the current and future investigations. The added sanctions are necessitated by the provision in the 1988 Act for access to business proprietary information by interested parties not represented by counsel.

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[1] *See* American Federation of Government Employees, AFL-CIO v. Block, 655 F.2d 1153, 1157–1158 (D.C. Cir. 1981). *See also* United States v. Garner, 767 F.2d 104, 120 (5th Cir. 1985) (quoting American Federation of Government Employees, AFL–CIO v. Block).

Section 207.10 is amended to add a provision requiring that allegations of critical circumstances made after the date of institution of the Commission's final investigation be made in more detail than allegations made earlier. This change is made to permit sufficient time for the Commission to make the complex critical circumstances determination required by the 1988 Act.

Sections 207.26 and 207.27 are removed, as is the reference to § 207.26 in § 207.11. This change is made because the 1988 Act makes significant changes in the factors which the Commission must consider in making determinations, thus rendering §§ 207.26 and 207.27 incompatible with current law.

A new § 207.26 is added to provide for procedure in proceedings to establish a short life cycle product category. Such procedure is needed because of a provision for such proceedings in the 1988 act.

List of Subjects in 19 CFR Part 207

Administrative practice and procedure, Investigations, Imports.

19 CFR Chapter II, Part 207 is amended as set forth below:

PART 207—[AMENDED]

1. The authority citation for Part 207 is revised to read as follows:

Authority: Secs. 303, 332, and 701–779 of the Tariff Act of 1930 (19 U.S.C. 1303, 1332, 1335, 1671–1677h); sec. 603 of the Trade Act of 1974 (19 U.S.C. 2582); secs. 3, 102–107, 1001, and 1002 of the Trade Agreements Act of 1979; and secs. 1311–1337 of the Omnibus Trade and Competitiveness Act of 1988.

§ 207.2 [Amended]

2. Section 207.2 is amended to remove paragraph (h), and redesignate paragraph (i) as paragraph (h).

3. Section 207.3 is revised to read as follows:

§ 207.3 Certification and service of documents.

Any person submitting factual information on behalf of the petitioner or any other interested party for inclusion in the record, and any person submitting a response to a Commission questionnaire, must certify that such information is accurate and complete to the best of the submitter's knowledge. Any party submitting a document for inclusion in the record of the investigation shall, in addition to complying with § 201.8 of this chapter, serve a copy of each such document on all other parties to the investigation in the manner prescribed in § 201.16 of this chapter. Failure to comply with the requirements of this rule may result in removal from status as a party. The Commission shall make available to all parties to the investigation a copy of each document, except transcripts of conferences and hearings and responses to requests under § 201.6(b) (confidential business information) of this Chapter and § 207.7 (documents under protective order), placed in the record of the investigation by the Commission.

4. Section 207.7 is amended by revising paragraphs (a), (b), (d), and (e), and adding paragraphs (f), (g), and (h) to read as follows:

§ 207.7 Limited disclosure of certain confidential information under a protective order.

(a) (1) *Disclosure* Upon receipt of a timely application filed by an authorized applicant which (1) describes in general terms the information requested, and (ii) sets forth the reasons for the request (*e.g.*, all business proprietary information properly disclosed pursuant to this section for the purpose of representing an interested party in proceedings pending before the Commission) the Secretary will make available all business proprietary information contained in Commission memoranda and reports and in written submissions filed with the Commission at any time during the investigation (except privileged information, classified information, and specific information of a type which there is a clear and compelling need to withhold from disclosure, *e.g.*, trade secrets) to the authorized applicant under a protective order described in paragraph (b) of this section. The term "business proprietary information" as used in this section has the same meaning as the term "confidential business information" as defined in section 201.6 of this Chapter.

(2) *Application* An application under paragraph (a)(1) of this section must be made by an authorized applicant on a form adopted by the Secretary or by certification that the authorized applicant agrees to be bound by the terms of the protective order entered pursuant to paragraph (b) of this section. An application must be made no later than the time that an entry of appearance is made pursuant to § 201.11 of this chapter.

(3) *Authorized applicant* Only an authorized applicant may file an application under this subsection. An authorized applicant is:

(i) An attorney, excepting in-house corporate counsel, for an interested party which is a party to the investigation.

(ii) An in-house corporate attorne an interested party which is a party the investigation, if the attorney is n involved in competitive decisionma as defined in *U.S. Steel Corp. v. Uni States*, 703 F.2d 1465 (Fed. Cir. 1984)

(iii) A consultant or expert under direction and control of a person un paragraph (a)(3)(i) or (ii) of this sect

(iv) A consultant or expert who appears regularly before the Commission.

(v) An interested party which is party to the investigation, if such interested party is not represented counsel.

A person under paragraph (a)(3)((v) of this section will be given acc the business proprietary informatio the record under such terms and conditions as required to assure its is limited to the current investigatio and that the recipient is not involve competitive decisionmaking as defi in *U.S. Steel Corp. v. United States, supra*.

(4) *Forms and determinations.* Th Secretary may adopt, from time to forms for submitting requests for disclosure pursuant to a protective incorporating the terms of this rule. Secretary shall determine whether t requirements for release of informat under this rule have been satisfied. determination will be made concern specific business proprietary information as expeditiously as pos but in no event later than fourteen (days from the filing of the informati or seven (7) days in a preliminary investigation, except if the submitte the information objects to its releas the information is unusually volumi or complex, in which case the determination will be made within (30) days from the filing of the information, or ten (10) days in a preliminary investigation. The Secre shall establish a list of parties whos applications have been granted. Th Secretary's determination shall be f for purposes of review by the U.S. C of International Trade under sectio 777(c)(2) of the Act. Should the Secretary determine pursuant to thi section that materials sought to be protected from public disclosure by interested person do not constitute business proprietary information or were not required to be served und paragraph (f) of this section, then th Secretary shall, upon request, issue order on behalf of the Commission requiring the return of all copies of materials served in accordance wit paragraph (f).

(b) *Protective order.* The protective order under which information is made available to the authorized applicant shall require him to submit to the Secretary a personal sworn statement that, in addition to such other conditions as the Secretary may require, he will:

(1) Not divulge any of the information so obtained and not otherwise available to him, to any person other than

(i) Personnel of the Commission concerned with the proceeding,

(ii) The person or agency from whom the information was obtained,

(iii) An attorney, excepting in-house counsel involved in competitive decision-making, employed on behalf of the party requesting the disclosure, and who has furnished a similar statement, or

(iv) Consultants and other experts under the control of the authorized applicant and those persons independently contracted with, or employed or supervised by, the authorized applicant having a need thereof in connection with the proceeding and who have furnished a similar statement;

(2) Use such information solely for the purposes of the Commission proceeding then in progress or for judicial or Commission review thereof;

(3) Not consult with any person not described in paragraph (b)(1) (iii) or (iv) of this section concerning such business proprietary information without first having received the written consent of the Secretary and the attorney of the party from whom such business proprietary information was obtained;

(4) Not copy or otherwise reproduce any business proprietary material obtained under the protective order except in accordance with procedures to be established by the Secretary; and

(5) Report promptly to the Secretary any breach of the protective order.

* * * * *

(d) *Sanctions for breach of protective order.* The sworn statement referred to in paragraph (b) of this section shall include an acknowledgment by the person providing it that breach thereof may subject to being barred from practice in any capacity before the Commission:

(1) The person submitting the statement, and

(2) Such person's partners, associates, employer, and employees,

for up to seven years following publication of a determination that the order has been breached. Any breach of a protective order may be referred to the United States Attorney. In the case of an attorney, accountant, or other professional, such breach also may be referred to the ethics panel of the appropriate professional association. The offender and the party he represents shall be subject to such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, the offender or the party represented by the offender, and denial of further access to business proprietary information in the current or any future proceedings before the Commission.

(e) *Sanction procedure.* The Commission shall determine whether any person has violated a protective order, and may impose sanctions in accordance with paragraph (d) of this section. Any person against whom a sanction is proposed to be applied shall be afforded a reasonable opportunity to be heard before the determination is made.

(f) *Service.* Any party filing written submissions which include business proprietary information to the Commission during an investigation shall at the same time serve complete copies of such submissions upon all authorized applicants appearing on the list established by the Secretary pursuant to paragraph (a)(3) of this section. Such submissions must be accompanied by a certificate of service. Business proprietary information in such submissions must be clearly marked as such when submitted, and must be segregated from other material being submitted.

(g) *Opportunity to comment.* Parties which obtain disclosure of business proprietary information pursuant to this section may comment on such information in their prehearing and posthearing briefs, and in their postconference briefs in a preliminary investigation. They may also file additional written comments on such information no later than five (5) calendar days after the deadline for posthearing briefs in a final investigation, or three (3) calendar days after the deadline for postconference briefs in a preliminary investigation. Such additional comments must be limited to comments on business proprietary information received in or after the posthearing briefs, or in or after the postconference briefs in a preliminary investigation. Additional comments which do not comply with the requirements of this paragraph may be stricken from the record. The time periods set out in this paragraph are not subject to § 201.6(a) of this chapter in that intermediate Saturdays, Sundays, and Federal legal holidays shall be not excluded from the computation of such time periods.

(h) *Applicability.* This section applies to investigations instituted after the effective date of the Omnibus Trade and Competitiveness Act of 1988.

5. Section 207.10 is amended to revise paragraph (b) and add a new paragraph (c) as follows:

§ 207.10 Filing of petition with the Commission.

* * * * *

(b) *Service of the petition.* A copy of the petition, or a version thereof omitting business proprietary information, shall be served by petitioner on those persons enumerated in 19 CFR 353.36(a)(6) and (a)(11) or in 19 CFR 355.26(a)(6) and (a)(10), as appropriate. A copy of the petition including all business proprietary information shall be served by petitioner on those persons enumerated on the list established by the Secretary pursuant to § 207.7(a)(3). Such service shall be attested by a certificate of service as required in § 201.16(c).

(c) When not made in the petition, any allegations of critical circumstances under section 703 or 733 of the Act shall be made in an amendment to the petition and shall be filed as early as possible. If filed after the date of institution of the Commission's final investigation, the allegation shall contain information reasonably available to petitioner concerning the factors enumerated in sections 705(b)(4)(A) and 735(b)(4)(A) of the Act.

§ 207.26 [Removed]

§ 207.27 [Removed]

§ 207.11 [Amended]

6. Section 207.26, § 207.27, and the second sentence of § 207.11 are removed.

7. A new § 207.26 is added to read as follows:

§ 207.26 Short life cycle products

(a) An eligible domestic entity may file a petition to establish a product category for short life cycle merchandise which has been the subject of two or more affirmative dumping determinations. The Commission shall within thirty (30) days of the filing of the petition determine its sufficiency. If the petition is found to be sufficient, the Commission shall institute a proceeding to establish a product category and publish a notice of institution in the **Federal Register.** Upon request of an interested person filed within fifteen (15) days after publication of the notice of institution, the Commission will conduct a hearing which shall be transcribed. The Commission's determination concerning the scope of the product category into which to classify the short life cycle merchandise identified by the petition shall be issued no later than ninety (90) days after the filing of the petition.

(b) The Commission may on its own initiative and at any time modify the scope of a product category established in a proceeding pursuant to paragraph (a) of this section. Ninety (90) days prior to such modification, the Commission shall publish a notice of proposed modification in the **Federal Register.** Upon request of an interested party filed within proposed modification in the **Federal Register.** Upon request of an interested party filed within fifteen (15) days after publication of the notice of proposed modification, the Commission will conduct a hearing which shall be transcribed. Written submissions concerning the proposed modification will be accepted if filed no later than sixty (60) days after publication of the notice of proposed modification.

By order of the Commission

Issued: August 24, 1988.

Kenneth R. Mason,

Secretary.

[FR Doc. 88-19637 Filed 8-26-88; 8:45 am]

BILLING CODE 7020-02-M

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19 CFR Parts 210 and 211

Interim Rules Governing Investigations and Enforcement Procedures Pertaining to Unfair Practices in Import Trade

AGENCY: U.S. International Trade Commission.

ACTION: Interim rules and request for comments.

SUMMARY: The Commission has revised 19 CFR Parts 210 and 211 on an interim basis to implement certain provisions of the Omnibus Trade and Competitiveness Act of 1988, which became effective on August 23, 1988.

DATES: The effective date of the interim rules is August 23, 1988. Comments on the interim rules will be considered if received on or before October 28, 1988.

ADDRESSES: A signed original and fourteen (14) copies of each set of comments, along with a cover letter addressed to Kenneth R. Mason, Secretary, should be sent to the U.S. International Trade Commission, Office of the Secretary, 500 E Street, SW., Room 112, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: P.N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-252-1061. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

SUPPLEMENTARY INFORMATION:

The Omnibus Trade and Competitiveness Act of 1988

On August 23, 1988, the Omnibus Trade and Competitiveness Act of 1988 ("the Omnibus Trade Act") became effective. This new legislation contains provisions that, inter alia, amend section 337 of the Tariff Act of 1930 ("the Tariff Act") (19 U.S.C. 1337) and repeal 19 U.S.C. 1337a.[1] As a result, the new legislation has affected the Commission's practice and procedure under section 337 as summarized below:

(1) The elements of a section 337 violation have changed. The definition of a domestic industry has been broadened for cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, and for cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. In addition, complainants are no longer required to prove, in any type of case, that the relevant domestic industry is efficiently and economically operated. Complainants also do not have to prove injury in cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, or in cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent.

(2) The law limits access to confidential business information that is exchanged among parties or submitted to the Commission in connection with a section 337 investigation to the following persons: (a) Those who are granted access under a protective order; (b) officers or employees of the Commission who are directly involved in carrying out the investigation; (c) officers or employees of the U.S. Government who are involved in the Presidential review of section 337 remedial orders pursuant to subsection (h) of section 337; and (d) officers or employees of the U.S. Customs Service who are directly involved in administering an exclusion order resulting from the investigation in connection with which the confidential business information was submitted. Disclosure of confidential business information to other persons without the consent of the submitter is prohibited by law.

(3) The Commission now has very short statutory deadlines for determining whether to grant or deny temporary relief—*viz.*, 90 days after institution in an ordinary investigation and up to 150 days in a "more complicated" investigation. Complainants can be required to post a bond as a prerequisite to obtaining such relief, and if the Commission ultimately determines that respondents have not violated section 337, the bond may be forfeited to the U.S. Treasury in in accordance with rules prescribed by the Commission.[2]

(4) The Commission's express jurisdiction under section 337 has been expanded to include actions that the Commission previously took pursuant to inherent authority under section 337 or authority derived from the Administrative Procedure Act ("the APA")—*i.e.*, (a) termination of investigations in whole or in part on the basis of settlement agreements or consent orders with no finding as to whether section 337 has been violated; (b) the issuance of affirmative final determinations and remedial orders (general or limited exclusion orders or cease and desist orders) in default cases; and (c) modification or rescission of remedial orders in response to a

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[1] *See* sections 1341(b) and 1342 of the Omnibus Trade Act. The bill that became the Omnibus Trade Act is H.R. 4848, 100th Cong. 2d Sess. (1988). The provisions of H.R. 4848 that amend section 337 of the Tariff Act and repeal 19 U.S.C. 1337a are identical to provisions of H.R. 3, 100th Cong., 2d Sess (1988), a previous trade bill which the President vetoed. For that reason, the legislative history of H.R. 3 also serves as the legislative history of the relevant provisions of H.R. 4848. *See* section 2 of the Omnibus Trade Act. (*See also* the citations in nn. 2, 9, 11, 12, 14, 15, 21, and 29 of this notice.)

[2] Section 337(e)(2) of the Tariff Act, created by section 1342(a)(3)(B) of the Omnibus Trade Act; H.R. Rep. No. 576, 100th Cong., 2nd Sess. 635-636 (1988). The Commission is not required to apply the new statutory provisions relating to the posting of temporary relief bonds by complainants until the earlier of the 90th day after enactment of the Omnibus Trade Act or the day on which the Commission issues interim regulations setting forth procedures relating to the posting of such bonds. Section 1342(d)(1)(B) of the Omnibus Trade Act; H.R. Rep. No. 576 at 635. Interim Commission rules governing the posting of temporary relief bonds and the possible forfeiture of such bonds will be published at a later date.

motion by a respondent previously found to be in violation of section 337.

(5) The relief and penalty provisions of section 337 have been strengthened. The Commission now has express authorization to issue cease and desist orders in addition to (as well as in lieu of) exclusion orders. Articles imported in violation of an outstanding exclusion order can be seized and forfeited by order of the Commission. The maximum daily statutory civil penalty for violation of a cease and desist order has been increased to $100,000 or twice the domestic value of the articles on each day they are entered or sold in violation of the order.

(6) The Commission is now authorized to impose sanctions for abuse of discovery and abuse of process in section 337 investigations to the extent provided by Rules 11 and 37 of the Federal Rules of Civil Procedure.

(7) The statutory provision exempting U.S. Government importations from section 337 remedial orders in patent-based investigations has been expanded to cover remedial orders in investigations based on infringement of a federally registered copyright or mask work.

(8) Any investigation due to be completed within 180 days after the enactment of the new legislation can be declared "complicated" and its 12-month or 18-month statutory deadline can be extended by as much as 3 months.

The Commission has determined to apply the amendments to section 337 contained in the new legislation to all pending section 337 investigations. To the extent such amendments affect the scope of a pending investigation, the Commission expects that a motion will be made to amend the scope and notice of that investigation pursuant to interim rule 210.22.

The Adoption of Interim Rules To Implement the Omnibus Trade and Competitiveness Act of 1988

As indicated above, the Omnibus Trade Act affects section 337 practice and procedure in many respects. Commission rules to implement new legislation ordinarily are promulgated in accordance with the rulemaking provisions of section 553 of the APA, which entails the following steps: (1) Publication of a notice of proposed rulemaking; (2) solicitation of public comment on the proposed rules; (3) Commission review of such comments prior to developing final rules; and (4) publication of the final rules 30 days prior to their effective date. *See* 5 U.S.C. 553. That procedure could not be utilized in this instance because the new legislation became effective upon enactment, and it was not possible to complete the procedure prior to the effective date of the new legislation.

The Commission thus determined to adopt interim rules that would go into effect upon enactment of the new legislation and would remain in effect until the Commission is able to adopt final rules promulgated in accordance with the usual notice, comment, and advance publication procedure.[3]

The Commission's authority to adopt interim rules without following all steps listed in section 553 of the APA is derived from two sources: (1) Section 335 of the Tariff Act (19 U.S.C. 1335) and (2) provisions of section 553 of the APA, which allow an agency to dispense with various steps in the prescribed rulemaking procedure under certain circumstances.

Section 335 of the Tariff Act authorizes the Commission "to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." 19 U.S.C. 1335. The Commission determined that the need for interim rules was clear in this instance. The Commission noted that the new legislation alters section 337 practice and procedure in many respects and that some Commission rules had to be revised so that they would not conflict with the new legislation or the congressional intent expressed in its legislative history. The Commission also found that other rules had to be revised in order (1) to conform to the language or provisions of the new legislation, (2) to bring the rule into technical conformity with the new legislation (*e.g.*, by inserting correct citations to redesignated subsections of the amended statute), or (3) to avoid confusion about how unrevised provisions of a rule would be applied in light of the new legislation. The Commission also found that it had to promulgate new rules to cover matters that are provided for in the new legislation but not covered by an existing rule. In sum, the Commission found that rulemaking was essential for the orderly administration of section 337 as amended by the new legislation. Furthermore, since the legislation was to become effective immediately upon enactment, the Commission concluded that it was imperative that implementing interim Commission rules be in place as close as possible to the enactment date of the new statute.

The Commission noted that an agency may dispense with publication of a notice of proposed rulemaking when the following circumstances exist: (1) The proposed rules are interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or (2) the agency for good cause finds that notice and the procedure for public comment are impracticable, unnecessary, or contrary to the public interest, and that finding and the reasons therefor are incorporated into the rules adopted by the agency. *See* 5 U.S.C. 553(b). An agency may also dispense with the publication of a notice of final rules 30 days prior to their effective date if (1) the rules are interpretive rules or statements of policy or (2) the agency finds that "good cause" exists for not meeting the advance publication requirement and that finding is published along with the rule. *See* 5 U.S.C. 553(d)(3).

In this instance, the Commission determined that the requisite circumstances existed for dispensing with the notice, comment, and advance publication that ordinarily precede the adoption of Commission rules. For purposes of invoking the section 553(b) exemption from publishing a notice of proposed rulemaking (which would have solicited public comment), the Commission noted that (1) the interim rules it intended to adopt are "agency rules of procedure or practice"; and (2) since the new legislation would become effective upon enactment, it clearly would be "impracticable" for the Commission to comply with the usual notice, comment, and advance publication procedure. For the purpose of invoking the section 553(d)(3) exemption from publishing advance notice of the interim rules 30 days prior to their effective date, the Commission found that the fact that the new legislation was effective upon enactment made such advance publication impossible and constituted "good cause" for the Commission not to comply with that requirement.

The Commission is cognizant that interim regulations should not respond to anything more than the exigencies created by the new legislation and expects that the final rules will emerge as a result of the congressionally mandated policy of affording public participation in the rulemaking process.[4] Having been promulgated in response to exigencies created by the new legislation, most of the interim revisions in Parts 210 and 211 come under one or more of the following categories: (1) Revision of a preexisting rule that conflicted with the new legislation or was inconsistent with congressional intent expressed in its legislative history; (2) a technical revision to make a preexisting rule conform to the language or subsection designations of the new legislation; (3) a cross-reference to an interim rule that was added to an otherwise unrevised preexisting rule to achieve intra-Part consistency and to avoid confusion about how the unrevised provisions of the rule are to be applied in light of the interim rule provisions concerning the same subject matter; (4) reorganization or rewording of a preexisting rule to avoid confusion about how the rule is to be applied in light of the new legislation; or (5) a new rule covering a matter provided for in the new legislation but not covered by a preexisting rule. Final rules will be issued at a later date in accordance with the usual notice, public comment, and advance publication procedure.

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[3] In addition to amending section 337 of the Tariff Act and repealing 19 U.S.C. 1337a, the Omnibus Trade Act contains provisions affecting the Commission's practice and procedure in antidumping the countervailing duty investigations, as well as investigations of import injury to industries, firms, or workers due to trade agreement concessions. For that reason, the Commission adopted interim revisions to 19 CFR Parts 206 and 207 (in addition to the interim revisions to Parts 210 and 211 that are set forth in this notice). The interim revisions to Parts 206 and 207 are published elsewhere in today's **Federal Register**.

The Commission also has determined, for the following reasons, that the interim rules contained in this notice are not subject to the provisions of Executive Order 12291 of February 17, 1981 (46 FR 13193, February 19, 1981) governing Federal regulation. Some of the interim rules pertain to administrative actions governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and thus are not "regulations" or "rules" within the meaning of section 1(a) of Executive Order 12291. The interim rules also do not qualify as "major rules" under section 1(b) of Executive Order 12291 because they do not result in (1) an annual effect on the economy of $100 million or more, (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises in domestic or export markets.

Explanation of the Interim Revisions in 19 CFR Part 210

Section 210.1

Section 210.1 describes the applicability of the rules in Part 210 and lists the statutory provisions that authorize the enactment of such rules. In order to bring § 210.1 into conformity with the new legislation, the following interim revisions have been made: (1) The reference to 19 U.S.C. 1337a has been deleted from § 210.1 because that statutory provision was repealed by the new legislation; [5] and (2) since the new legislation expressly authorizes the Commission to promulgate rules imposing sanctions for abuse of discovery and abuse of process in proceedings under section 337 of the Tariff Act,[6] section 337 is cited as one of the statutory provisions authorizing the Commission to promulgate the rules in Part 210.

Sections 210.2 and 210.4

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.

Section 210.5

Section 1342(a)(5)(B) of the Omnibus Trade Act creates a new subsection (h) of section 337 of the Tariff Act, which authorizes the Commission to prescribe rules for imposing sanctions for abuse of process in section 337 investigations to the extent sanctions could be imposed in Federal district courts under Rule 11 of the Federal Rules of Civil Procedure ("FRCP").

FRCP 11 requires the following:

(1) That every pleading, motion, or other paper filed by a party is to be signed by the party's attorney of record—or by the party himself if he is appearing pro se; and

(2) That the signature of the attorney or the party constitutes certification that—

(a) The signer has read the document,

(b) That to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law (or a good faith argument for extension, modification, or reversal of the existing law), and

(c) That the document is not being interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FRCP 11 also provides sanctions for violations of its signing and certification provisions. If a document is not signed, FRCP 11 authorizes the court to strike the document from the record of the proceeding unless the document is signed promptly after the omission is called to the attention of the pleader or the movant. If the document is signed in violation of any of the certification provisions, the court upon motion or sua sponte can impose an appropriate sanction on the person who signed the document, the represented party, or both. Appropriate sanctions may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including reasonable attorneys' fees.

The Commission rules that govern the signing and filing of written submissions in section 337 proceedings are § 210.5 of Part 210 ("Written submissions") and § 201.8(e) of Part 201 ("Identification of party filing document"). In order to bring § 210.5 into conformity with the signing, certification, and sanction provisions of FRCP 11, § 210.5 has been revised in the following manner:

(1) There is a new paragraph (b) of § 210.5. It corresponds to the relevant provisions of FRCP 11 (including the title) and incorporates the § 201.8(e) provision that signing a document constitutes certification that the signer was duly authorized to sign it.

(2) The previous paragraph (b) of § 210.5 has been redesignated paragraph (c) and retitled "Filing of documents," and the references to § 201.8(e) of Part 201 has been deleted.

(3) The previous paragraph (c) of § 210.5 has been deleted.

The Commission will determine at a later date whether to publish proposed rules governing the issuance of orders directing the payment of costs and attorneys' fees as a sanction for abuse of process.

Section 210.6

The previous enactment of section 337 of the Tariff Act did not contain provisions governing the handling of confidential business information. Instead, the procedures for handling such information in section 337 proceedings were set forth in various Commission rules and in protective orders issued by the presiding ALJ in each investigation.[7]

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[4] *See American Federation of Government Employees, AFL–CIO* v. *Block*, 655 F.2d 1153, 1157–1158 (D.C. Cir. 1981). *See also United States* v. *Garner*, 767 F.2d 104, 120 (5th Circ. 1985) (quoting *American Federation of Government Employees, AFL–CIO* v. *Block*).

[5] Section 1337a of title 19 of the U.S. Code provided that the importation of products made, produced, processed, or mined under or by means of a process covered by an unexpired, valid U.S. patent was cognizable under section 337 to the same extent as the importation of any product or article covered by the claims of a valid and unexpired U.S. Letters Patent. Section 1342(c) of the Omnibus Trade Act repealed that provision. Under the new section 337(a)(1)(B)(ii) of the Tariff Act (created by section 1342(a)(1) of the Omnibus Trade Act), the importation or sale of an article made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent is a violation of section 337 (provided that the other statutory elements of a violation exist).

[6] *See* section 337(h) of the Tariff Act, created by section 1342(a)(5)(B) of the Omnibus Trade Act.

Section 1342(a)(8) of the Omnibus Trade Act added a new subsection (n) to section 337 governing the handling of confidential business information in section 337 proceedings and imposing restrictions on the disclosure of such information without the consent of the submitter.

Section 210.6 of 19 CFR Part 210 has been revised on an interim basis in the following manner: (1) The previous provisions of § 210.6 now constitute paragraph (a) of that section; and (2) there is a new paragraph (b) corresponding to the new statutory restrictions on disclosure of confidential information and providing cross-references to other Commission rules pertaining to the handling and disclosure of such information.

Section 210.7

This section pertains to computation of time, additional hearings, postponements, continuances, and extensions of time in section 337 investigations. It previously provided that such matters are governed by the provisions of § 201.14 of Part 201. Since interim § 210.24(e) of Part 210 contains provisions that conflict with the provisions of § 201.14 (*e.g.*, intervening Saturdays, Sundays, and holidays are not excluded from the computation of time for filing certain documents under interim § 210.24(e)), the words "except as provided in § 210.24(e) (2), (7), and (17)" have been added to § 210.7 for intra-Part consistency and to prevent confusion.

Section 210.8

Section 210.8 identifies the general rule governing service of process and other documents in section 337 investigations. Because interim § 210.24(e) contains exceptions to the general rule concerning service of documents (*e.g.*, certain documents must be served in a manner other than by first class mail), the words "except as provided in § 210.24(e) (4), (7), and (17)" have been added to § 210.8 for intra-Part consistency and to avoid confusion.

Section 210.10

Paragraph (a) of § 210.10 requires, inter alia, that complainants file with the Commission 1 copy of the complaint for each person named in the complaint as a proposed respondent. (Those copies are subsequently served by the Commission pursuant to § 210.13 when the Commission institutes an investigation of the complaint.) The preexisting provisions of § 210.10 have not been changed, but the interim revisions to § 210.24(e) made it necessary to add clarifying language to § 210.10. Interim § 210.24(e)(4) requires complainants seeking temporary relief to serve copies of the complaint on all proposed respondents on the same day the complaint and motion for temporary relief are filed with the Commission. To avoid confusing prospective complainants, paragraph (a) of § 210.10 has been revised to indicate that complainants who are seeking temporary relief are to provide additional copies of the complaint and the motion for temporary relief for each proposed respondent and the appropriate foreign government notwithstanding the provisions of § 210.24(e)(4).

Section 210.11

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.12

Section 210.12 discusses the manner in which the Commission institutes (or declines to institute) a section 337 investigation on the basis of a complaint. In its previous form, § 210.12 imposed a 30-day deadline for deciding whether to take such action (except in "exceptional circumstances"). Since interim § 210.24(e) (2), (7), and (8) provide exceptions to the 30-day deadline (other than the "exceptional circumstances" noted by the former § 210.12), the words "except as provided in § 210.24(e) (2), (7), and (8)" have been added to § 210.12 for intra-Part consistency and to avoid confusing prospective parties in section 337 proceedings. In addition, since interim § 210.24(e)(4) requires complainants seeking temporary relief to serve copies of the complaint and motion for temporary relief upon each proposed respondent the day the complaint and motion are filed with the Commission, § 210.12 has been revised to indicate that if the Commission determines not to institute an investigation, the proposed respondents (as well as the complainant) shall receive notice of the Commission's action.

Section 210.13

Section 210.13 was previously entitled "Service of complaint and notice of investigation" and discussed such service by the Commission upon institution of an investigation of the complaint. The substance of this section has not been changed, but it has been reworded for clarity. Additionally, because interim § 210.24(e)(4) requires complainants seeking temporary relief to serve copies of the complaint and motion for temporary relief on all proposed respondents on the same day the complaint and motion are filed with the Commission, the words "by the Commission" have been added to the title of § 210.13. The Commission also has added a provision to § 210.13 indicating that the complaint and notice of investigation are to be served by the Commission upon institution of an investigation despite the fact that complainant was required to serve a copy of the complaint on each proposed respondent pursuant to interim § 210.24(e)(4). Service of the complaint and notice of investigation by the Commission is the operative service for the purpose of computing the deadline for filing a response to the complaint.

Section 210.20

Section 210.20 specifies what information and materials must be provided in or with a complaint under section 337 of the Tariff Act in order for it to be considered "properly filed" and to result in the institution of an investigation. The preexisting § 210.20 of Part 210 essentially required all complaints to allege and make a prima facie showing of unfair methods of competition and unfair acts in the importation of articles into the United States or in their sale. All complaints also were required to specifically allege and provide corroborating information that the "effect or tendency" of the alleged unfair methods and acts was one of the following: (1) Destruction of or substantial injury to an efficiently and economically operated domestic industry; (2) prevention of the establishment of such an industry; or (3) restraint or monopolization of trade and commerce in the United States.

Section 1342(a)(1) of the Omnibus Trade Act amended subsection (a) of section 337 of the Tariff Act by altering the elements of a section 337 violation. Under the new law, all complaints must still allege (1) that the proposed respondents have engaged in unfair methods of competition and unfair acts in the importation or sale of the accused imported articles,[8] and (2) that there is a domestic industry for the type of articles in question or that such an industry is in the process of being established.[9] The definition of a domestic industry has been broadened for cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, and for cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent.[10] However, complainants are no longer required to prove, in any type of case, that the relevant domestic industry is efficiently and economically operated.[11] An additional aspect of the new law is that the nature of the alleged unfair act or method will determine whether complainant will be required to prove that the respondents' unfair methods of competition and unfair acts have a "threat or effect" (instead of an "effect or tendency") to cause injury of some sort.[12] Complainants do not have to make such a showing in cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, or in cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent.

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[7] *See* § 201.6 (a) and (c) of 19 CFR Part 201; former §§ 210.6, 210.37, and 210.44 of Part 210; former § 211.52 of Part 211.

In order bring § 210.20 of this Part into conformity with the new legislation, § 210.20 has been revised to correspond to the changed elements of a section 337 violation and to prevent confusion about what data must be provided with complaints based on various types of unfair methods and unfair acts.

Section 210.20 previously was divided into six paragraphs. Paragraph (a) listed the required contents of a section 337 complaint; paragraph (b) provided for the submission of samples of the subject domestic and imported articles as exhibits to the complaint; and paragraphs (c) through (f) listed the additional materials that had to be provided with complaints based on the alleged infringement of a patent, registered federal trademark, nonfederally registered trademark, or registered copyright, or the importation or sale of a product produced under a process covered by claims of a valid and unexpired U.S. patent.

The interim revisions to § 210.20 consist of changes in paragraph (a) and the addition of a new paragraph (g). Paragraphs (b) through (f) of § 210.20 have not been changed.

The Commission has made interim revisions to paragraphs (a)(3), (a)(6), (a)(7), (a)(8), (a)(9), and (a)(10) of § 210.20 to bring them into conformity with the new legislation or to reduce confusion about how substantively unmodified provisions of those paragraphs are to be satisfied in light of the new legislation.

Paragraph (a)(3) of § 210.20 requires that the complaint describe specific instances of alleged unlawful importations or sales. The former version of paragraph (a)(3) required the complaint to include the Tariff Schedules of the United States item number under which the subject article was imported. Section 1217(b) of the Omnibus Trade Act provides for the implementation of the Harmonized Tariff System of the United States, which will become effective on January 1, 1989. For that reason, paragraph (a)(3) of § 210.20 of the Commission's rules has been revised to state that for importations occurring prior to January 1, 1989, the complaint must include the Tariff Schedules of the United States item number under which the article was imported, and for importations occurring on or after January 1, 1989, the complaint must list the Harmonized Tariff Schedule of the United States heading or subheading under which the subject article was imported.

Paragraph (a)(6) of § 210.20 lists the information that must be provided with respect to the relevant domestic industry or the trade and commerce affected by the alleged unfair methods and acts. Paragraph (a)(6) has been revised (1) to correspond to the new statutory provisions concerning the relevant "domestic industry" and proof that such industry exists or is in the process of being established. It also has been revised by changing the phrase "effect or tendency" to "threat or effect" (to destroy or substantially injure a domestic industry).

Paragraph (a)(7) of § 210.20 provides for the submission of information concerning the complainant and its position vis-a-vis the relevant domestic industry or the trade or commerce affected by the proposed respondents' alleged unfair acts. In its preexisting form, paragraph (a)(7) required the complainant to submit certain data when the complaint was based on alleged infringement of an intellectual property right. The only specific types of intellectual property rights cases that are expressly referred to in the amended statute are infringement of a patent or a federally registered copyright, trademark, or mask work, and the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. (*See* section 337(a)(1) (B) through (D) and section 337(l) of the Tariff Act.) Section 337(a)(1)(A) of the amended statute does encompass, however, unfair methods of competition and unfair acts other than the aforesaid types. That provision would cover complaints based on alleged infringement of a common-law trademark or misappropriation of a trade secret. The Commission has therefore revised paragraph (a)(7) of § 210.20 to make it clear that the term "intellectual property right" as used in that paragraph is not limited to patents or federally registered copyrights, trademarks, or mask works.

In its preexisting form, paragraph (a)(8) of § 210.20 required that complainants submit information supporting the injury theory set forth in the complaint. As explained previously, under the new law, complainants do not have to prove injury in cases based on alleged infringement of a patent or a federally registered copyright, trademark, or mask work, or in cases based on the importation or sale of an article allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. The Commission accordingly has revised paragraph (a)(8) of § 210.20 to make it clear that injury data are to be provided only with respect to alleged violations based on unfair methods and acts other than the aforesaid types.

To be consistent with the new industry provision and the reworded injury provisions of section 337 of the

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[8] *See generally* section 1342(a)(1) of the Omnibus Trade Act; section 337(a) (1) and (4) of the Tariff Act.

[9] *See* section 1342(a)(1) of the Omnibus Trade Act; section 337(a) (1), (2), and (3) of the Tariff Act. *See also* H.R. Rep. No. 40, 100th Cong., 1st Sess. 156–158 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. 129–130 (1987); H.R. Rep. No. 576 at 633–634.

[10] *See* section 1342(a)(1) of the Omnibus Trade Act; section 337(a) (2) and (3) of the Tariff Act.

[11] *See* H.R. Rep. No. 40 at 154–156; S. Rep. No. 71 at 127–129; H.R. Rep. No. 576 *supra*.

[12] The injury requirement has been eliminated entirely for alleged violations based on infringement of a patent or a federally registered patent, copyright, trademark, or mask work, and for alleged violations based on the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. *See* section 1342(a)(1) of the Omnibus Trade Act; section 337(a)(1) (B), (C), and (D) of the Tariff Act; H.R. Rep. No. 40 at 154–156; S. Rep. No. 71 at 127–129; H.R. Rep. No. 576 at 633. The substitution of the word "threat" for "tendency" is intended to codify previous Commission practice with respect to its interpretation of the word "tendency," under which it construes "tendency" as "threat." The wording change is not intended to introduce a new standard for proving injury. *See* H.R. Rep. No. 576 at 633.

Tariff Act, paragraph (a)(8) of § 210.20 also has been revised by changing the phrase "effect or tendency" to "threat or effect" and by changing the phrase "efficiently and economically operated domestic industry" to "domestic industry."

In its previous form, paragraph (a)(9) of § 210.20 required certain information relating to the patent in controversy when the complaint was based on "the alleged unauthorized importation or sale of an article covered by, or produced under a process covered by, the claims of a valid U.S. letter patent." Paragraph (a)(9) of § 210.20 has been revised to correspond to the language of the new section 337(a)(1)(B) of the Tariff Act. It now refers to the provision of certain information when the complaint is based on "the infringement of a valid and enforceable U.S. patent or the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent."

Paragraph (a)(10 of § 210.20 formerly required complainants who sought temporary relief to file a separate motion for such relief along with the complaint in accordance with preexisting § 210.24(e). Paragraph (a)(10) of § 210.20 has been revised to be consistent with interim paragraphs (e) (1) through (3) of § 210.24, which allow motions for temporary relief to be filed concurrently with the complaint or prior to the institution of an investigation but not after such institution.

The final revision of § 210.20 consists of the addition of a new paragraph (g) requiring the submission of material to document the existence of a federally registered mask work when the complaint is based on the alleged infringement of that type of intellectual property right.

Section 210.21

Section 210.21 governs the content and filing of responses to complaints and notices of investigation. Paragraph (a), which pertains to the time for filing such a response, has been revised to include the exception to the 20-day response deadline provided for in interim § 210.24(e)(9).

Sections 210.22 and 210.23

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.

Section 210.24

The new legislation has altered the previous temporary relief provisions of section 337 of the Tariff Act (*i.e.*, the former subsections (e) and (f) of section 337) in the following manner:

(1) There are now statutory deadlines for determining whether to order temporary relief—*viz.*, 90 days after institution in an ordinary investigation and up to 150 days after institution in a "more complicated" investigation.[13] (Institution occurs when the Commission's notice of investigation is published in the **Federal Register**. *See* interim § 210.12.)

(2) Complainants may be required to post a bond as a prerequisite to obtaining temporary relief,[14] and if the Commission ultimately determines that respondents have not violated section 337, the bond may be forfeited to the U.S. Treasury.[15]

(3) The Commission now has express authorization to issue temporary cease and desist orders in addition to (as well as in lieu of) temporary exclusion orders.[16]

(4) The Commission is authorized to grant preliminary (*i.e.*, temporary) relief to the same extent that preliminary injunctions and temporary restraining orders may be granted by Federal courts under the FRCP.[17]

The previous paragraph (e) of § 210.24 addressed only the content and filing the motions for temporary relief and responses thereto. The interim revisions to paragraph (e) of § 210.24 include revisions of the former provisions and the addition of new provisions governing all other aspects of the temporary relief decision-making process.[18] The principal objectives of the interim revisions are to expedite the decision-making process and to accommodate the new statutory deadlines for determining whether to order temporary relief.

The new legislation does not require any change in the substantive information that must be provided with the motion for temporary relief. The previous provisions of § 210.24(e) that pertained to the content of motions for temporary relief thus have been retained. However, because of the limited time available for discovery pertaining to the motion after an investigation is instituted, each complainant seeking temporary relief is now required to file along with the motion all evidence and information in its possession that complainant intends to submit in support of the motion, in addition to the usual affidavits. *See* paragraph (e)(1) of interim § 210.24.

The previous provisions pertaining to the filing of motions for temporary relief have been revised so that complainants may file motions for temporary relief concurrently with the complaint, or at any time prior to the Commission's decision on whether to institute an investigation, but not after an investigation has been instituted. *See* paragraphs (e)(1), (2), and (3) of interim § 210.24. A prohibition on the post-institution filing of motions for temporary relief was adopted because: (1) The deadline for completing the temporary relief decision-making process is measured from the date the investigation was instituted, not the filing date of the motion; (2) the stringent statutory deadlines will benefit complainants, but will pose a substantial burden on respondents, the Commission investigative attorney, the presiding ALJ, and the Commission; and (3) a reduction of investigation time resulting from the complainant's delay in seeking temporary relief (even if the delay was justified) would be prejudicial to the rights of the other parties and could jeopardize the Commission's ability to adjudicate the motion in a timely fashion.

The interim revisions provide that when a motion for temporary relief is filed after the compliant but before the Commission has determined whether to institute an investigation based on the complaint, the 35-day period allotted for review of the complaint and the motion for temporary relief and for informal investigative activity will begin to run anew from the date on which the motion was filed. *See* paragraphs (e) (2) and (8) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions concerning service by complainants of motions for temporary relief. Under former provisions of Part 210, motions for temporary relief were not served on the respondents until an investigation had been instituted. If the motion was filed along with the complaint, the motion was served by the Commission along with the complaint and notice of investigation after institution. If the motion was filed after the complaint, complainant served it on the respondents. (*See* former §§ 210.13 and 210.24(e)(1).)

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[13] Section 1342(a)(3)(B) of the Omnibus Trade Act; section 337(e)(2) of the Tariff Act.

[14] *Id. See also* H.R. Rep. No. 576 at 633–636. *See supra* n.2 regarding interim rules governing the posting of temporary relief bonds by complainants.

[15] *See* H.R. Rep. No. 576 at 635–636. *See supra* n.2 regarding bond forfeiture rules.

[16] Section 1342(a)(4)(A) of the Omnibus Trade Act; section 337(f) of the Tariff Act.

[17] *See* section 1342(a)(3)(B) of the Omnibus Trade Act; section 337(e)(3) of the Tariff Act.

[18] The new interim provisions governing temporary relief have been added to interim § 210.24 for convenience and to avoid having to renumber sections in Part 210 because of the insertion of new interim provisions. The final provisions governing temporary relief may be set out in one or more new sections.

The interim revisions to § 210.24(e) make the following provisions concerning service of motions for temporary relief:

(1) The previous rule provisions requiring service by the Commission upon institution of an investigation will remain in force. However, paragraph (e)(4) of interim § 210.24 now provides that a complainant seeking temporary relief must serve nonconfidential copies of the complaint and a motion for temporary relief (including nonconfidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of the foreign country(s) represented by the proposed respondents. Such service is to be made on the same day that the complaint and motion for temporary relief are filed with the Commission. The Commission believes that such service is necessary and appropriate because the time for responding to motions for temporary relief must be substantially reduced in light of the short statutory deadlines for determining whether to grant or deny the motion. (See the discussion below). The Commission notes further that giving proposed respondents advance notice of the allegations against them will enable them to consult an attorney and to decide prior to the tolling of the period for filing a response to the motion for temporary relief what course of action to pursue if an investigation is instituted. The Commission also hopes that service of the complaint and motion for temporary relief on the day both documents are filed with the Commission will reduce the number of respondents who will request extensions of the deadline within which to respond to the motion for temporary relief.

(2) In order to give proposed respondents the benefit of at least 30 full days in which to make the necessary preliminary arrangements, the revisions to § 210.24(e) require (1) that service of the complaint and motion for temporary relief be effected by the fastest possible means and (2) that the Commission will decide whether to institute an investigation within 35 days (rather than 30 days) after the complaint and motion are filed. *See* paragraphs (e) (4) and (8) of interim § 210.24. The revisions provide further that a signed certificate of service must accompany the complaint and motion for temporary relief. If the certificate does not accompany the complaint and the motion, the Secretary shall not accept the complaint or the motion and shall promptly notify the submitter. Actual proof of service (or proof of a serious effort to make service)—*e.g.*, certified mail return receipts, courier or overnight delivery receipts, or other proof of delivery—need not be filed with the complaint and motion, but should be retained by the complainant in the event that the complainant is requested to provide actual proof of service. *See* paragraph (e)(4) of interim § 210.24.

(3) Any purportedly confidential business information which is deleted from the nonconfidential service copies of the complaint and motion for temporary relief must satisfy the requirements of § 201.6(a) of Part 201 (which defines confidential information for purposes of Commission proceedings). Despite such deletions, the nonconfidential service copies must contain enough factual information about each element of the violation alleged in the complaint and the motion for temporary relief to enable each proposed respondent to comprehend the allegations against it. *See* paragraph (e)(5) of interim § 210.24.

(4) The service copies of the complaint and motion for temporary relief must be accompanied by a notice (in a form prescribed by paragraph (e)(6) of interim § 210.24) explaining that the service of the complaint and motion does not initiate an investigation. The notice must state the date on which the complaint and motion for temporary relief are to be filed with the Commission. The prescribed text of the notice also summarizes the provisions of interim §§ 210.10 through 210.13 concerning (1) the commencement of section 337 proceedings, (2) the action of the Commission upon receipt of the complaint, (3) the institution of an investigation, and (4) service by the Commission of the complaint and the motion for temporary relief. Copies of the notice must be filed along with the proof of service. *See* paragraph (e)(6) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions concerning preinstitution processing of motions for temporary relief. Each motion for temporary relief will be processed concurrently with and in the same manner as the complaint. In other words, the Commission will examine the motion for its sufficiency and compliance with the pertinent rules and will conduct informal investigative activity relating to the motion as needed. The Commission also will determine whether to accept a motion for temporary relief at the same time it determines whether to institute an investigation on the basis of the complaint.[19] Commission rejection of an insufficient or improperly filed complaint will preclude acceptance of a motion for temporary relief. However, Commission rejection of a motion for temporary relief will not preclude institution of an investigation of the complaint. *See* paragraph (e)(8) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions pertaining to amendment of motions for temporary relief. Amendment before an investigation is instituted is a matter of right. However, all material filed to supplement or amend the motion must be served on all proposed respondents and on the embassies of foreign governments that they represent. If the amendment expands the scope of the motion, the 35-day period allotted for determining whether to institute an investigation and to initiate temporary relief proceedings shall begin to run anew from the date the amendment is filed with the Commission. *See* paragraph (e)(7) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions pertaining to the filing of responses to motions for temporary relief. Under the former § 210.24(e), respondents and the Commission investigative attorney had 20 days to file such responses if the motion for temporary relief was filed with the complaint. If the motion was filed after an investigation had been instituted, responses were due 10 days after service of the motion.

In light of the short statutory deadlines for concluding the temporary relief proceedings and the fact that respondents will have prior notice of the complaint and motion for temporary relief, the Commission determined that the period for responding to the motion for temporary relief (and the complaint) must be reduced to 10 days (plus additional time if service pursuant to § 210.13 was by mail). Because a respondent's response to the complaint and notice of investigation helps to define the issues in a section 337 investigation, each respondent's response to the complaint and notice also must be filed in 10 days, along with its response to the motion for temporary relief. *See* paragraph (e)(9) of interim § 210.24.

With respect to adjudication of motions for temporary relief, interim

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[19] Such acceptance will constitute provisional acceptance for purposes of referring the motion to an ALJ for issuance of an ID, and the ALJ is not precluded from subsequently issuing an ID dismissing the motion if appropriate reasons exist for doing so.

§ 210.24(e) essentially retains the bifurcated process utilized under the former rules—*i.e.*, (1) use of the ID/discretionary Commission review procedure to determine whether there is reason to believe that section 337 has been violated, and (2) Commission determination of the issues of the appropriate form of relief, whether the public interest factors enumerated in the statute preclude such relief, and the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of the investigation and the temporary relief order.[20] However, the interim rule provisions modify that process somewhat, in the manner described below.

Interim § 210.24(e) contains new provisions stating that after the motion has been referred to an ALJ, the ALJ has discretion to determine the following matters: (1) The extent to which the parties will be permitted to engage in discovery; (2) the form and extent of the evidentiary hearing, if such a hearing is conducted; and (3) the extent to which parties will be permitted to file proposed findings of fact, proposed conclusions of law, and briefs pursuant to interim § 210.52. *See* paragraphs (e) (10), (12), (13), and (14) of interim § 210.24. In light of the stringent statutory deadlines for concluding the temporary relief phase of an investigation, the ALJ's decision on the aforesaid matters is not reviewable on the basis of a petition filed pursuant to interim § 210.54 (discretionary Commission review of an ID) or on the basis of an application for interlocutory appeal filed pursuant to § 210.70. *See* paragraph (e)(15) of interim § 210.24.

Since the legislative history of the new legislation indicates that the Commission should not grant temporary exclusion orders without an inter partes APA hearing [21] and the Commission intends to follow the same procedure when determining whether to grant a temporary cease and desist order, the interim revisions to § 210.24(e) provide that no hearing will be held if summary judgment is granted for the respondents (*i.e.*, if temporary relief is denied on that basis). *See* paragraph (e)(13) of interim § 210.24. The interim revisions further provide that the Commission's acceptance of a motion for temporary relief prior to the institution of an investigation is a provisional acceptance for purposes of referring the motion to the ALJ and that the ALJ is not precluded from issuing an ID dismissing the motion without a hearing if the facts and circumstances so warrant. *See* paragraphs (e) (8) and (13) of interim § 210.24

With regard to designating an investigation "more complicated," the Commission notes that there may be cases in which additional time is needed for the adjudication of motions for temporary relief, but not for the final disposition of the investigation. The interim revisions to § 210.24(e) therefore provide that an investigation may be designated "more complicated" for the purpose of extending the deadline for deciding whether to order temporary relief and/or for the purpose of extending the statutory deadline for completing the investigation. *See* paragraph (e)(11) of interim § 210.24 (*See also* paragraphs (a) and (b) of interim § 210.59.) The revisions to § 210.24(e) further provide that if warranted, the Commission may designate an investigation "more complicated" for purposes of adjudicating the motion for temporary relief at the same time it determines whether the motion is properly filed and should be forwarded to the ALJ. However, since it is not always possible to gauge the complexity of a temporary relief motion from the face of the motion or the corroborating documentation, the interim revisions also authorize the ALJ to issue an order, sua sponte or on motion, designating an investigation "more complicated" for the purpose of extending the deadline for issuing the temporary relief ID and the Commission's deadline for determining whether to grant or deny such temporary relief. Such an order by the ALJ constitutes a final Commission determination, and notice of the order shall be published in the **Federal Register** as required by the statute and interim § 210.59. *See* paragraph (e)(11) of interim § 210.24.[22]

Another noteworthy difference between the former rules and the interim revisions is that under the interim rules, the ALJ may compel discovery pertaining to the issues of the appropriate form of temporary relief, whether the public interest factors enumerated in the statute preclude the issuance of such relief, and the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of the investigation and any temporary relief order issued in response to the motion.[23] The ALJ may, but will not be required to, take evidence on those issues at the hearing or to address them in the ID on whether there is reason to believe a violation exists. However, as part of the standard analysis for determining whether to grant or deny a motion for temporary relief, the ALJ should take evidence and the ID should address the question of what effect the form of relief requested in the motion would have on the public interest. *See generally* paragraphs (e)(12), (13), (17) and (18) of interim § 210.24.

In order to accommodate the new statutory deadlines for determining whether to order temporary relief, the interim revisions to § 210.24(e) provide that in an ordinary investigation, the ID is to be issued within 70 days after publication of the notice of investigation in the **Federal Register** in an ordinary case, and within 120 days after such publication in a "more complicated" investigation. *See* paragraph (e)(17) of interim § 210.24. The interim rules also provide that the record relating to all temporary relief issues should be certified to the Commission as soon as possible after the close of reception of evidence, rather than certifying the record of the Commission concurrently with the ID. *See* paragraph (e)(16) of interim § 210.24. The advance certification provision was added in order to facilitate prompt and timely Commission action (if any) with respect to the ID and with respect to the issues of the appropriate form of relief, the public interest factors enumerated in the statute, and bonding by complainant and respondents.

The interim rules also contain new provisions pertaining to the disposition of a temporary relief ID after it has been issued. In order to comply with the statutory deadlines for determining whether to grant temporary relief, the ID will become the Commission's determination 20 calendar days after issuance (not service) thereof in an ordinary case, and 30 calendar days after issuance in a "more complicated" investigation—unless the Commission modifies or vacates the ID within that period. Such modification or vacation may be ordered on the basis of errors of law or policy reasons articulated by the Commission. The existence of alleged errors of fact will not be considered. *See* paragraph (e)(17) of interim § 210.24.

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[20] When the interim bonding rules are promulgated (*see supra* n.2), they may provide that the Commission also will determine whether complainant should be required to post a bond as a prerequisite to obtaining temporary relief and, if so, the amount of the bond.

[21] H. R. Rep. No. 576 at 635.

[22] Motion to designate an investigation "more complicated" for the purpose of extending the deadline for concluding the entire investigation and determining whether there is a violation of section 337 will continue to be decided according to the ID/discretionary review procedure. *See* interim §§ 210.53(c) and 210.59 (a) and (b).

[23] As stated in n. 2 *supra*, interim rules pertaining to the posting of temporary relief bonds by complainants will be set forth in a separate notice to be published at a later date.

In order to assist the Commission in determining whether modification or revocation is warranted, all parties will be permitted to file written comments concerning the presence (or absence) of errors of law in the ID or policy reasons that justify such action (or which show that it would not be justified). Such comments will be limited to 30 pages and must be filed no later than 7 calendar days after issuance of the ID in an ordinary case and 10 calendar days after issuance of the ID in a "more complicated" investigation. (Because of time constraints imposed by the new statutory deadlines for determining whether to order temporary relief, additional time for IDs served by mail will not be allotted.) *See* paragraph (e)(17) of interim § 210.24.

In keeping with the Commission's statutory obligation to consult with and to seek advice and information from other federal agencies in section 337 proceedings, other agencies will be given an opportunity to file comments on the ID. *See* paragraph (e)(17) of interim § 210.24

Each party may file a response to other parties' comments within 12 calendar days after issuance of the ID in an ordinary case and within 14 days after issuance of the ID in a "more complicated" investigation. (Again, because of the constraints imposed by the statutory deadlines, additional time if service of the initial comments was by mail will not be provided. The parties thus are expected to cooperate in this matter and facilitate the filing of timely and useful responses by serving their initial comments on each other by the fastest means available. The reply comments will be limited to 15 pages. *See* paragraph (e)(17) of interim § 210.24

For purposes of determining (1) the appropriate form of temporary relief (if such relief is to be granted), (2) whether the statutory public interest factors preclude such relief, and (3) the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of the investigation and any temporary relief order issued in response to the motion, the procedure set forth in paragraph (e)(18) of interim § 210.24 is as follows:

(1) While the motion for temporary relief is before the ALJ, he will supervise and, if necessary, will compel discovery on the remedy, public interest, and bonding issues as specified in paragraphs (e) (12), (13), and (17) of interim § 210.24.

(2) On the 60th day after institution in an ordinary case, or on the 105th day after institution in a "more complicated" investigation, all parties may file written submissions addressing those issues. *See* paragraph (e)(18) of interim § 210.24.

(3) The ALJ will certify the record to the Commission as soon as possible after the closing of the reception of evidence (as discussed above) and on the 70th day after institution in an ordinary investigation or on the 120th day after institution in a "more complicated" investigation, the ALJ will issue a temporary relief ID. *See* paragraphs (e) (16) and (17) of interim § 210.24. The ALJ may address in the ID the remedy, public interest, and bonding issues that will be considered by the Commission, but he is not required to do so. The only public interest issue that the ID must address is that of the effect the form of relief requested in the motion would have on the public interest. *See* paragraph (e)(17) of interim § 210.24. However the ALJ's findings on the public interest may be superceded by Commission findings on that issue, as discussed below. *See* paragraph (e)(18) of interim § 210.24.

(4) On or before the statutory deadline for determining whether to order temporary relief, the Commission will determine: (a) What form of relief is appropriate in light of any violation that appears to exist (notwithstanding the form of relief complainant may be seeking); (b) whether the public interest factors enumerated in the statute preclude such relief; and (c) the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission.[24] In the event that Commission findings on the public interest are inconsistent with findings made by the administrative law judge in the initial determination, the Commission's findings are controlling. *See* paragraph (e)(18) of interim § 210.24.

The previous enactment of section 337 made no express provision for the issuance of affirmative final determinations and remedial orders in situations in which one or more of the respondents defaults. The Commission took such action, however, pursuant to former § 210.25. Section 1342(a)(5)(B) of the Omnibus Trade Act amends section 337 by adding a new subsection (g), which authorizes the Commission to (1) reach an affirmative final determination concerning the violation of section 337 with respect to defaulting respondents, and (2) issue a limited or general exclusion order or a cease and desist order if certain conditions are met.

Section 210.25

The new legislation differs from the Commission's previous default practice in the following respects: Paragraph (c) of former § 210.25 authorized the Commission to draw adverse inferences against defaulting respondents in determining whether complainant had made a prima facie case of a section 337 violation. However, such inferences could be drawn only "with respect to those issues for which the complainant has made a good faith but unsuccessful effort to obtain evidence." The new legislation permits more liberal use of adverse inferences if the complainant is seeking relief limited to the defaulting respondent. Specifically, the new legislation provides that "the Commission shall presume the facts alleged in the complaint to be true" as long as the grounds for default have been satisfied.[25] It thus establishes a pure default rule (similar to federal district court practice) in cases in which the complainant is seeking limited relief against a particular respondent.

In order to bring § 210.25 into conformity with the new legislation, paragraph (c) of § 210.25 ("Relief against a respondent in default") has been revised to conform to the language and provisions of the new legislation (and its legislative history, where appropriate). The Commission has retained the previous provision of § 210.25 that authorizes the Commission to utilize adverse inferences in determining whether section 337 has been violated in a default case where complainant is seeking a general exclusion order.

The previous paragraphs (a) and (b) of § 210.25 (which provide the definition of default and the procedure for determining default) are not inconsistent with the provisions of the new legislation and therefore have not been revised, except that the reference in paragraph (a) to failure to file a response to the complaint and notice of investigation within the time provided in interim § 210.21 has been changed to refer to interim § 210.24(e)(9) as well as interim § 210.21.

Section 210.26

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

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[24] *Id.*

[25] Section 1342(a)(5)(B) of the Omnibus Trade Act; section 337(g)(1) of the Tariff Act.

Section 210.30

Section 210.30 sets forth general provisions governing discovery. Paragraph (c) of that section discusses general limitations on discovery. For clarity—and to be consistent with the provisions of interim § 210.24(e)(12) which give the ALJ discretion to control the nature and extent of discovery pertaining to a motion for temporary relief—§ 210.30(c) has been revised to state that the ALJ shall limit the kind or amount of discovery to be had, or the period during which discovery may be carried out, in a manner that is consistent with the time limitations set forth in paragraph (e)(17) of interim § 210.24 for adjudicating motions for temporary relief or the time limitations imposed by interim § 210.53(a) for issuing an ID on permanent relief. The other provisions of § 210.30 have not been changed.

Sections 210.31 through 210.35

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.

Section 210.36

As noted above, section 1342(a)(5)(B) of the Omnibus Trade Act created a new subsection (h) of section 337, which authorizes the Commission to prescribe rules for imposing sanctions for abuse of discovery in section 337 investigations to the extent sanctions could be imposed by a Federal district court under Rule 37 of the FRCP.

The Commission rule governing sanctions for abuse of discovery is § 210.36. It has not been revised, for the following reasons. The existing provisions of § 210.36 provide sanctions that are comparable to those available under FRCP 37, except that there is no provision for a sanction order directing payment of a party's costs and attorneys' fees. The Commission will determine at a later date whether to publish proposed rules governing the issuance of orders directing the payment of costs and attorneys' fees as a sanction for abuse of discovery.

Section 210.37

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.40

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.41

Section 210.41 sets forth general provisions governing hearings in section 337 investigations. Paragraph (a) has been revised to include a cross-reference to paragraph (e)(13) of interim § 210.24 concerning the ALJ's discretion as to the conduct of a hearing on motions for temporary relief. No other changes have been made in this section.

Section 210.42

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.43

Section 210.43 defines what constitutes the administrative record in a section 337 proceeding. It also sets forth procedures for reporting and transcribing hearings, correcting hearing transcripts, and certifying the record to the Commission concurrently with an ID or at such time as the Commission may order. The only revision is the insertion of the phrase "except as provided in § 210.24(e)(16) of this part" at the beginning of paragraph (d) of § 210.43. This change was made in order to maintain intra-Part consistency and to reiterate that certification of the record of a temporary relief proceeding may occur prior to issuance of the temporary ID.

Section 210.44

Section 210.44 makes provision for in camera treatment of confidential information. Paragraph (a) of § 210.44(a), which defines in camera treatment for purposes of a section 337 investigation, has been revised (1) to conform to the new statutory restrictions on disclosure of confidential information and (2) to include cross-references to the other Commission rule concerning the same subject matter, namely interim § 210.6. Paragraph (e) of § 210.44—which provides for "declassification" (*i.e.*, removal of the confidential designation from information so designated by the submitter)—also has been revised (1) to conform to the new statutory provision which indicates that the confidentiality of information submitted or exchanged among the parties is determined by the Commission's rules, and (2) to be consistent with section 1342(a)(8) of the Omnibus Trade Act, which created a new subsection (n) of section 337 providing that information that is (properly) designated confidential by the submitter cannot be declassified and publicly disclosed without the consent of the submitter.

Section 210.50

The new legislation did not necessitate revision of this section. The interim provisions of § 210.50 are the same as the former provisions, except that a cross-reference to paragraph (e)(17) of interim § 210.24 has been added to paragraph (f) of § 210.50. Paragraph (f) previously stated that an administrative law judge's order of summary determination constituted an initial determination under § 210.53. Since paragraph (e)(13) of interim § 210.24 contemplates the possible issuance of a summary determination a motion for temporary relief by an administrative law judge and states that such a ruling shall be in the form of an initial determination under paragraph (e)(17) of interim § 210.24, the cross-reference to paragraph (e)(17) of interim § 210.24 was necessary for intra-Part consistency.

Section 210.51

The previous enactment of section 337 made no provision for the Commission to terminate an investigation in whole or in part on the basis of a settlement agreement or a consent order without a concurrent determination as to whether section 337 had been violated. Prior to the enactment of the new legislation, the Commission took such action on the basis of authority derived from the APA.

Section 1342(a)(2) of the Omnibus Trade Act amends subsection (c) of section 337 to give the Commission express authority to take such action. Section 210.51 of the Commission's rules, which governs termination of investigations, has been revised by adding, to paragraphs (b) and (c) of that section, a citation to the new statutory provision that authorizes the Commission to order terminations on the basis of a settlement agreement or a consent order without making a determination as to whether section 337 has been violated. Since the statute indicates that such terminations "may" be ordered without making a determination as to whether a violation has occurred and it is possible that there may be instances in which such a determination would be appropriate, paragraphs (b) and (c) have been further revised to indicate that the Commission can, but is not required to, make a violation determination when it terminates an investigation in whole or in part on the basis of a settlement agreement or consent order.

Section 210.51 also has been revised by including the word "settlement" before "agreement," where appropriate, in order to make it plain that the licensing and other agreements discussed in that section are "settlement agreements" for purposes of the amended statute.

Section 210.52

Section 210.52 governs the filing of proposed findings of fact, proposed conclusions of law, and briefs by the parties. The former § 210.52 gave parties the right to file such documents with no restrictions on subject matter, page length, or the time of filing (except that the presiding ALJ was given some discretion to determine the time for filing such documents after an evidentiary hearing under former § 210.41). Section 1342(a)(3)(B) of the Omnibus Trade Act amends subsection (e) of section 337 by creating statutory deadlines for determining whether to grant or deny temporary relief. For that reason and in order to be consistent with paragraph (e)(14) of interim § 210.24 of the Commission's rules (which allows the ALJ to determine to what extent the parties will be permitted to file proposed findings of fact, proposed conclusions of law, and briefs), the words "except as provided in § 210.24(e)(14)" have been inserted into the first sentence of § 210.52 of the rules.

Section 210.53

Former § 210.53 governed the issuance and disposition of IDs for all matters that were to be adjudicated by the ID/discretionary review procedure—including motions for temporary relief and motions for designating an investigation "more complicated." In light of the interim revisions to § 210.24(e) concerning those matters, the phrase "except as provided in § 210.24(e)" or similar clarification has been inserted into paragraphs (b), (c), (h), and (i) of § 210.53. These changes were made to indicate that Commission review of and the finality of IDs pertaining to temporary relief and ALJ determinations to designate an investigation "more complicated" for purposes of adjudicating a motion for temporary relief are governed by interim § 210.24(e) and not interim § 210.53.

Because interim § 210.59(c) contains new provisions concerning the issuance of IDs designating an investigation "complicated" (see the discussion below), paragraph (c) of § 210.53 has been revised to cover IDs on that issue as well.

Section 210.54

Former § 210.54 governed the filing and disposition of petitions for review of IDs, including those pertaining to the grant or denial of temporary relief. In light of the interim revisions to §§ 210.24(e) and 210.53, § 210.54 has been revised to indicate that (1) paragraph (e)(17) of interim § 210.24 (and not § 210.54) governs the parties' ability to challenge IDs pertaining to temporary relief, and (2) and ALJ's determination to designate an investigation "more complicated" to obtain more time to adjudicate a motion for temporary relief is not reviewable since it constitutes a final determination of the Commission pursuant to paragraph (e)(11) of the interim § 210.24.

Section 210.55

Section 210.55 governs review of an ID on the Commission's own initiative rather than in response to a petition for review. In order to conform to interim §§ 210.24(e), 210.53 and 210.54, § 210.55 has been revised to indicate that (1) paragraph (e)(17) of interim § 210.24 (and not § 210.54) governs the parties' ability to challenge IDs pertaining to temporary relief, and (2) an ALJ's determination to designate an investigation "more complicated" to obtain more time to adjudicate a motion for temporary relief is not reviewable since it constitutes a final determination of the Commission pursuant to paragraph (e)(11) of interim § 210.24.

Section 210.56

Section 210.56 governs the process of reviewing of IDs. The former provisions of this section discussed (1) the filing of briefs, (2) requests for oral argument, (3) the scope of the review, (4) what action the Commission could take upon completion of the review, and (5) the time limits for concluding a review of an ID concerning temporary relief. The same types of revisions that were made in §§ 210.54 and 210.55 have been made in § 210.56.

Section 210.57

Former paragraph (c) of § 210.57 provided (1) that all Commission actions except exclusion orders generally are enforceable when the affected party received notice of such action, and (2) that exclusion orders are enforceable when the Secretary of the Treasury receives notice of such orders.

Section 1342(a)(5)(B) of the Omnibus Trade Act amended section 337 of the Tariff Act by creating a new subsection (i), which authories the Commission, if certain conditions are met, to order seizure and forfeiture of articles imported in violation of an outstanding permanent (and final) exclusion order. In cases in which such seizure and forfeiture is ordered, the Commission must notify the Secretary of the Treasury and, upon receipt of the order, the Secretary must enforce it in accordance with the procedure set forth in the statute.

Paragraph (c) of § 210.57 of the rules has been revised to indicate that all Commission actions except exclusion orders and seizure and forfeiture orders generally are enforceable when the affected party receives notice of such action, and that exclusion and seizure and forfeiture orders are enforceable when the Secretary of the Treasury receives notice of such orders.

Former paragraph (d) of § 210.57 has been revised to correct a typographical error in the first sentence, which made the sentence unintelligible.

Section 210.58

Section 210.58 governs the Commission's adjudication of the issues of remedy, the public interest, and bonding in section 337 investigations. The following revisions have been made in this rule.

(1) The previous enactment of section 337 of the Tariff Act provided that if the Commission determined that there was a violation of section 337, the Commission could order exclusion of the subject imports or, in lieu of exclusion, the Commission could issue cease and desist orders. (The same rule applied for temporary relief.) Section 1342(a)(4)(A) of the Omnibus Trade Act amended subsection (f) of section 337 by giving the Commission express authority to issue cease and desist orders in addition to (as well as in lieu of) exclusion orders. Revisions have been made in paragraph (a) of § 210.58 of the Commission's rules in order to correspond to the change in the statutory relief provisions.

(2) As discussed above in connection with interim § 210.25, the new legislation also makes provision for the issuance of "general" or "limited" exclusion orders. (*See* section 1342(a)(5) of the Omnibus Trade Act creating a subsection (g) of section 337.) Paragraph (a) of § 210.58 of the Commission's rules has been modified to make explicit the option available to the Commission in determining whether to order articles to be excluded from entry into the United States.

(3) The reference in paragraph (a) of § 210.58 to the bonding provision of former subsection (g)(3) of section 337 has been changed to "subsection (j)(3)," which is the new designation for that subsection. (*See* section 1342(a)(5)(A) of the Omnibus Trade Act.)

(4) Paragraph (b) of § 210.58 of the Commission's rules formerly provided that the ALJ could make findings in the temporary relief ID pertaining to the public interest but he could not compel

discovery solely to obtain information relating to the public interest. In light of the provisions of interim § 210.24(e), which now authorize ALJs to compel discovery and make findings on remedy, the public interest, and bonding issues when adjudicating motions for temporary relief, a reference to paragraphs (e)(12), (13), and (17) of interim § 210.24 have been added to paragraph (b) of § 210.58 for intra-Part consistency and to prevent confusion.[26]

Section 210.59

Former § 210.59, (entitled "Period for concluding investigation") previously discussed the following matters: (1) The 12-month and 18-month statutory deadlines for completing ordinary and "more complicated" investigations; (2) the grounds and procedure for designating an investigation "more complicated"; and (3) the exclusion of any time during which an investigation was suspended, in computing the statutory deadline for completion of the investigation.

Section 210.59 has been revised in the following manner:

(1) The previous text of § 210.59 has been incorporated into a new paragraph (a).

(2) To be consistent with the provisions of interim § 210.24(e), a new paragraph (b) has been added to § 210.59 to provide for the designation of an investigation as "more complicated" solely for the purpose of obtaining more time to adjudicate a motion for temporary relief.

(3) The other revisions to § 210.59 pertain to "complicated" (as opposed to "more complicated") investigations. Section 1342(d)(2) of the Omnibus Trade Act provides that any investigation under section 337 of the Tariff Act that is due to be completed within 180 days after enactment of the Omnibus Trade Act can be declared "complicated," and the 12-month or 18-month statutory deadline can be extended for up to an additional 90 days. New provisions for "complicated" investigations have been added to § 210.59 of the Commission's rules as paragraph (c). The first part of paragraph (c) corresponds to the language of the new legislation, which provides for "complicated" designations. The second half of paragraph (c) provides a general definition of a "complicated" investigation and also provides that the ID/discretionary review procedure is to be used to obtain that designation. The appropriateness of ordering the "complicated" designation and the length of the resulting extension of time will depend on the facts and circumstances in each case.

Sections 210.60 and 210.61

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.[27]

Section 210.70

Section 210.70 governs interlocutory appeals to the Commission of actions taken by the ALJ. The preexisting provisions of this rule have been retained, but the Commission has added the phrase "except as provided in § 210.24(e)(15)" to be consistent with the new interim provisions of that section, which expressly disallow such appeals in connection with motions for temporary relief because of the stringent statutory deadlines for determining whether to grant such motions.

Section 210.71

Section 210.71 sets out the statutory right to judicial review of Commission determinations under section 337. The new legislation resulted in a technical amendment in the previous statutory provisions governing such review—*i.e.*, the reference to judicial review of a Commission determination "under subsection (d), (e), or (f) of section 337" was changed to "subsection (d), (e), (f) or (g) of section 337." (*See* section 1342(b)(2)(A) of the Omnibus Trade Act.) A corresponding revision has been made in § 210.71.

Explanation of the Interim Revisions to 19 CFR Part 211

Section 211.01

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the reference to "section 337" has been changed to "section 337 of the Tariff Act of 1930."

Section 211.10

Paragraphs (a) and (b) of this section were revised to correct an erroneous cross-reference to former § 210.14 which no longer exists. The references to that section have been changed to "§ 210.58(a)(1)". In addition, the reference to "section 337" in paragraph (a) of § 211.10 has been changed to "section 337 of the Tariff Act of 1930."

Section 211.20

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except for minor editorial changes.

Section 211.21

Section 211.21 pertains to settlement by consent. Paragraph (b) of this section has been revised in the same fashion as § 210.51 of Part 210—*i.e.*, the Commission has added a citation to the new statutory provision authorizing terminations on the basis of consent orders without a determination of whether section 337 has been violated. In addition, the citation to §§ 210.54 through 210.56 in paragraph (b) of § 211.21 has been corrected to refer to interim §§ 210.53 through 210.56.

Section 211.22

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the previous references to "section 337" have been changed to "section 337 of the Tariff Act of 1930" where appropriate.

Section 211.50

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the previous references to "section 337" have been changed to "section 337 of the Tariff Act of 1930" where appropriate.

Section 211.51

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the first sentence of paragraph (a) has been revised to correct a typographical error.

Section 211.52

Section 211.52 pertains to the handling and treatment of confidential information submitted to the Commission pursuant to a final Commission action. This rule has been revised to be consistent with the new legislative provisions concerning the handling of confidential information in section 337 proceedings and with other Commission rules pertaining to the same subject treatment. The revisions primarily consist of cross-references to the other applicable rules.

Section 211.53

The new legislation did not necessitate revision of these sections. The interim provisions are the same as the former provisions, except that references to the Commission's former "Unfair Import Investigations Division" and the "the Chief" of that division have been changed to "the Office of Unfair Import Investigations" (consistent with a similar reference in interim § 210.24(e)(6) and "the Director."

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[26] Because the temporary relief provisions of the new legislation provide for the possible posting of a temporary relief bond by the complainant as a prerequisite to obtaining such relief, the Commission may eventually revise paragraph (a) of section 210.58 further to include that issue as part of the Commission's bonding analysis. (*See supra* n.2.)

[27] But see *infra* n. 29 with respect to § 210.61.

Section 211.54

The new legislation did not necessitate revision of this section.[28] The interim provisions are the same as the former provisions, except that the previous reference to "section 337" in paragraph (b) has been changed to "section 337 of the Tariff Act of 1930" where appropriate.

Section 211.55

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the previous reference in paragraph (b) to "subsection (a) above" has been changed to "paragraph (a) of this section."

Sections 211.56, 211.58, and 211.59

In addition to authorizing the Commission to issue cease and desist orders in addition to an exclusion order, section 1342(a)(5)(B) of the Omnibus Trade Act amends section 337 of the Tariff Act by creating a new subsection (i), which authorizes the Commission, if certain conditions are met, to order seizure and forfeiture of articles imported in violation of section 337 and an outstanding permanent (and final) exclusion order. In cases in which such seizure and forfeiture is ordered, the Commission must notify the Secretary of the Treasury and, upon receipt of the order, the Secretary must enforce it in accordance with the procedure set forth in the statute.

The Commission determined that the most logical place to insert interim Commission rules providing for the issuance of seizure and forfeiture orders is in Subpart C of Part 211. Subpart C of Part 211 governs, inter alia, enforcement of Commission exclusion orders, cease and desist orders, and consent orders. Section 211.56(c) in that subpart provides for (1) formal Commission enforcement proceedings, (2) the resulting modification or revocation of the order in question to prevent unfair practices, and (3) the initiation of civil actions for civil penalties or injunctive relief. Since the new seizure and forfeiture provisions of section 337 will be an additional means of enforcing Commission exclusion orders, the seizure and forfeiture provisions have been implemented on an interim basis by adding a new paragraph (c)(5) to § 211.56. The new paragraph (c)(5) of § 211.56 corresponds to the seizure and forefeiture provisions of the new legislation. Section 211.56 also has been revised in the following manner: (1) The reference in paragraph (a) to the Commission's former "Unfair Import Investigations Division" has been changed to "the Office of Unfair Import Investigations" (consistent with a similar reference in interim §§ 210.24(e)(6) and 211.53); and (2) the previous references to "section 337(f)" in paragraphs (b) and (c) have been changed to "subsection (f) of section 337 of the Tariff Act of 1930."

As part of the general plan for interim implementation of the new seizure and forfeiture provisions, the Commission also has revised § 211.58 ("Temporary emergency action") to provide for the issuance of seizure and forfeiture orders on an emergency basis, pending the institution of formal Commission enforcement proceedings pursuant to § 211.56(c).

Finally, since the proposed seizure and forfeiture provisions require the Commission to notify the Secretary of the Treasury whenever a seizure and forefeiture order is issued (so that the order can be enforced), the Commission also has revised § 211.59 ("Notice of enforcement action to government agencies") to expressly provide for such notification.

Section 211.57

Section 1342(a)(6)(B) of the Omnibus Trade Act amended section 337 by adding a new subsection (k) providing for the modification or rescission of an exclusion from entry or an order issued under subsections (d), (e), (f), (g), or (i) of section 337. The new statutory provision authorizes the Commission to modify or rescind temporary and permanent remedial orders in response to a petition filed by a respondent who was previously found to be in violation of section 337, provided that such action is warranted on the basis of new evidence, or evidence that could not have been presented during the proceeding that led to the issuance of the order, or on grounds that would permit relief from a judgment or an order under the FRCP.[29]

Commission § 211.57, formerly entitled "Modification or dissolutio final Commission actions," has bee revised in the following manner:

(1) To conform to language of the statutory provisions, the word "rescission" has been substituted f "dissolution" and the word "petitio has been substituted for "motion."

(2) The former provisions regardi the filing of motions under § 211.57 new language corresponding to the statutory provisions pertaining to th filing of petitions for modifications revocation by a party previously fou to be in violation of section 337 hav respectively become paragraphs (1) (2) of a newly created paragraph (a) § 211.57 entitled "Petitions for modification or rescission of final Commission actions."

(3) The remaining provisions of fo § 211.57 have become paragraph (b) that rule, which is entitled "Commis action upon receipt of a petition."

List of Subjects

19 CFR Part 210

Administrative practice and procedure, Investigations of unfair a and unfair methods of competition i U.S. import trade.

19 CFR Part 211

Administrative practice and procedure, Enforcement.

Chapter II, Subchapter C of Title 1 the Code of Federal Regulations is amended as follows:

1. Part 210 is revised to read as follows:

PART 210—ADJUDICATIVE PROCEDURES

Sec.
210.1 Applicability of part.
210.2 General policy.

Subpart A—General Provisions

210.4 Definitions.
210.5 Written submissions.
210.6 Confidential business informatio
210.7 Computation of time, additional hearings, postponements, continuan and extensions of time.

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[28] But see *infra* n.29 with respect to § 211.54(b).

[29] The House and Senate reports accompanying the original House and Senate versions of the trade bill stated that this provision is intended to codify the existing Commission practice. H.R. No. 40 at 161; S. Rep. No. 71 at 133. The Commission notes, however, that the new legislation differs significantly from preexisting Commission rules under which respondents and other parties could have obtained implicit or explicit modification or rescission of a remedial order or the determina that resulted in the issuance of the order—*viz.* former §§ 210.61, 211.57, and 211.54(b). For pu of implementing the new statutory provisions interim basis, the Commission has decided sim to incorporate the statutory provisions into § 2 But for purposes of developing final rules to implement the new modification and rescissio provisions, the Commission will assess interim §§ 210.61, 211.54(b), and 211.57(a) to determine whether to develop new or revised rules gove modification or rescission of final Commission actions. Interested persons are encouraged to comment on the issue.

210.8 Service of process and other documents.

Subpart B—Commencement of Proceedings

210.10 Commencement of proceedings.
210.11 Action of Commission upon receipt of complaint.
210.12 Institution of investigation.
210.13 Service of complaint and notice of investigation by the Commission.

Subpart C—Pleadings and Motions

210.20 The complaint.
210.21 The response.
210.22 Amendments to pleadings and notice of investigation.
210.23 Supplemental submissions.
210.24 Motions.
210.25 Default.
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Subpart D—Discovery and Compulsory Process

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210.36 Failure to make discovery; sanctions.
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Subpart E—Prehearing Conferences and Hearings

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210.41 General provisions for hearings.
210.42 Evidence.
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210.50 Summary determinations.
210.51 Termination of investigation.
210.52 Proposed findings and conclusions.
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210.54 Petition for review.
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210.56 Review by Commission.
210.57 Implementation of Commission action.
210.58 Commission action, public interest factor, and bonding.
210.59 Period for concluding Commission investigation.

Subpart G—Appeals

210.60 Petition for reconsideration.
210.61 Disposition of petition for reconsideration.
210.70 Interlocutory appeals.
210.71 Appeals of final determination to the United States Court of Appeals for the Federal Circuit.

Authority 19 U.S.C. 1333, 1335, and 1337.

§ 210.1 Applicability of Part.

The rules in this Part govern procedure relating to proceedings under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). These rules are authorized by section 333, 335, and 337 of the Tariff Act of 1930 (19 U.S.C. 1333, 1335, and 1337).

§ 210.2 General policy.

It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings, the administrative law judge and counsel or other representative for each party shall make every effort at each stage of the proceedings to avoid delay.

Subpart A—General Provisions

§ 210.4 Definitions.

As used in this part—

"Administrative law judge" means the person appointed under section 3105 of Title 5 of the United States Code presiding over the taking of evidence in an investigation under this Part;

"Commission investigative attorney" means, for purposes of a particular proceeding under section 337 of the Tariff Act, the attorney(s) designated to engage in investigatory activities with respect to the proceeding, in his (or their) capacity as investigator(s) in the proceeding;

"Complainant" means a person who has filed a complaint with the Commission under this part;

"Party" means each complainant and respondent in the investigation, the Commission investigative attorney, and each person permitted to intervene pursuant to § 210.26;

"Respondent" means any person named in a notice of investigation issued under this Part as allegedly violating section 337 of the Tariff Act

§ 210.5 Written submissions

(a) *Caption; names of parties.* Every submission shall contain a caption setting forth the name of the Commission, the title of the investigation, the docket number or investigation number assigned to the proceeding, if any, and, in the case of a complaint and response, the names of all or the primary parties to the proceeding.

(b) *Signing of pleadings, motions, and other papers; sanctions.* Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign or his duly authorized officer or agent shall sign the party's pleading, motion, or other paper, and shall state the party's address. Except when otherwise provided in §§ 210.20(a), 210.21, and 210.24(e) (1) and (9), pleadings, motions, and other papers need not be under oath or accompanied by an affidavit. The signature of an attorney or party, or the party's duly authorized officer or agent constitutes certification by the signer that:

(1) He is duly authorized to sign the pleading, motion, or other paper;

(2) He has read the document;

(3) To the best of the signer's knowledge, information, and belief founded after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(4) The document is not being filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this section, the Commission or (if the case is before the administrative law judge) the administrative law judge, upon motion or sua sponte, shall impose upon the person who signed the document, the represented party, or both, an appropriate sanction.

(c) *Filing of documents.* Submissions shall be filed in accordance with paragraphs (a), (b), and (c) of this section and § 210.8 of this chapter. Except as otherwise provided for in this Part or by the Commission, the original and fourteen (14) true copies of each submission shall be filed with the Commission. While an investigation is before an administrative law judge, the original and six (6) true copies of each submission shall be filed with the Commission Secretary.

(d) *Service of submissions.* Except as otherwise provided for in this part, or by the Commission or the administrative law judge, each submission filed by a party with the Commission shall be served on all other parties and in a manner provided for in § 210.16 of this chapter.

§ 210.6 Confidential business information

(a) *Confidential business information defined and identified.* Confidential business information shall be defined in accordance with § 210.6(a) of this chapter and shall be identified and submitted in accordance with § 210.6(c) of this chapter.

(b) *Restrictions on disclosure.* Information that is submitted to the Commission or exchanged among the parties in connection with proceedings under this part, is designated confidential by the person submitting it (pursuant to paragraph (a) of this section), and is in fact confidential within the meaning of § 210.6(a) of this chapter, may not be disclosed without the consent of the person submitting it to anyone but the following persons:

(1) Persons who are granted access to confidential information under orders issued pursuant to § 210.37(a) or § 210.44;

(2) An officer or employee of the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted;

(3) An officer or employee of the United States Government who is directly involved in a review conducted pursuant to section 337(j) of the Tariff Act of 1930; or

(4) An officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under section 337(d) or 337(g) of the Tariff Act or an entry under bond under section 337(e) of the Tariff Act resulting from the investigation in connection with which the information was submitted.

§ 210.7 Computation of time, additional hearings, postponements, continuances, and extensions of time.

Unless otherwise ordered by the Commission or the administrative law judge and except as provided in § 210.24(e) (2), (7), and (17), the computation of time, the granting of additional hearings, postponements, continuances, and extensions of time shall be in accordance with § 201.14 of this chapter.

§ 210.8 Service of process and other documents.

Unless otherwise ordered by the Commission or the administrative law judge and except as provided in § 210.24(e) (4), (7), and (17), the service or process and other documents shall be in accordance with § 201.16 of this chapter.

Subpart B—Commencement of Proceedings

§ 210.10 Commencement of proceedings.

(a) *Upon receipt of complaint.* A proceeding is commenced by filing with the Secretary of the Commission the original and fourteen (14) true copies of a complaint, plus one copy for each person named in the complaint as violating section 337 of the Tariff Act and one (1) copy for the government of each foreign country of any person or persons so named. If the complainant is seeking temporary relief, one (1) additional copy of the motion for such relief also must be filed for each proposed respondent and for the government of the foreign country of the proposed respondent. The additional copies of the complaint and motion for temporary relief for each proposed respondent and the appropriate foreign government are to be provided notwithstanding the provisions of § 210.24(e)(4) that require service of the complaint and motion for temporary relief by the complainant.

(b) *Upon the initiative of the Commission.* The Commission may upon its initiative commence proceedings based upon any alleged violation of section 337 of the Tariff Act.

§ 210.11 Action of Commission upon receipt of complaint.

Upon receipt of a complaint filed pursuant to § 201.8 of this chapter and §§ 210.5, 210.10, and 210.20, the Commission shall take the following actions:

(a) *Examination of complaint.* The Commission shall examine the complaint for sufficiency and compliance with the applicable rules of this chapter.

(b) *Informal investigatory activity.* The Commission shall identify sources of relevant information, assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and give attention to other preliminary matters.

§ 210.12 Institution of investigation.

Except as provided in § 210.24(e) (2), (7), and (8), within thirty (30) days after receipt of a complaint or, in exceptional circumstances, as soon after such period as possible, the Commission shall determine whether the complaint is properly filed and, if so, shall vote on whether to institute an investigation. The complaint may be withdrawn as a matter of right before the Commission votes on whether to institute an investigation. The investigation shall be instituted by notice published in the **Federal Register**. Such notice will define the scope of the investigation. If the Commission determines not to institute an investigation, the complaint shall be dismissed and the Commission shall notify the complainant and all proposed respondents in writing of the Commission's action and the reason(s) therefor.

§ 210.13 Service of complaint and notice of investigation by the Commission.

Notwithstanding the provisions of § 210.24(e)(4) requiring service of the complaint by the complainant, the Commission, upon institution of an investigation, shall serve copies of the complaint and the notice of investigation (and any accompanying motion for temporary relief) upon the following:

(a) Each respondent;

(b) The Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other agencies and Departments as the Commission considers appropriate; and

(c) The embassy in Washington, DC of the government of each foreign country represented by each respondent.

All respondents named after an investigation has been instituted and the governments of the foreign countries they represent shall be served as soon as possible after the respondents are named.

Subpart C—Pleadings and Motions

§ 210.20 The complaint.

(a) Contents of the complaint. In addition to conforming with the requirements of § 201.8 of this chapter and § 210.5 (a), (b), and (c), the complaint shall—

(1) Be under oath and signed by the complainant or his duly authorized officer, attorney, or agent, with the name, address, and telephone number of the complainant and any such officer, attorney, or agent given on the first page of the complaint;

(2) Include a statement of the facts constituting the alleged unfair methods of competition and unfair acts;

(3) Describe specific instances of alleged unlawful importations or sales; for importations occurring prior to January 1, 1989, include the Tariff Schedules of the United States item number under which the article was imported; for importations occurring on or after January 1, 1989, include the Harmonized Tariff Schedule of the United States item number under which the article was imported;

(4) State the name, address, and nature of the business (when such nature is known) of each person alleged to be violating section 337 of the Tariff Act;

(5) Include a statement as to whether or not the alleged unfair methods of competition and unfair acts, or the subject matter thereof, are or have been the subject of any court or agency

litigation, and, if so, include a brief summary of such litigation;

(6)(i) When the alleged violation of section 337 is based on an unfair method of competition or an unfair act other than infringement of a U.S. patent or a federally registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, and an element of the complaint is the existence of a threat or effect to destroy or substantially injure, or to prevent the establishment of, such a domestic industry, include a description of the domestic industry affected, including the relevant operations of any licensees; or

(ii) When the alleged violation of section 337 is based on an unfair method of competition or an unfair act other than infringement of a U.S. patent or a federally registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, and an element of the complaint is the existence of a threat or effect to restrain or monopolize trade and commerce in the United States, include a description of the trade and commerce affected; or

(iii) When the alleged violation of section 337 is based on infringement of a U.S. patent or infringement of a federally registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, include a description of the relevant domestic industry as defined in section 337(a)(3), including the relevant operations of any licensees. Relevant information includes but is not limited to:

(A) Significant investment in plant and equipment;

(B) Significant employment of labor or capital; or

(C) Substantial investment in the exploitation of the subject patent, copyright, trademark, or mask work, including engineering, research and development, or licensing;

(7) Include a description of the complainant's business and its interests in the relevant domestic industry or in the trade and commerce allegedly affected. For every intellectual property based complaint (regardless of the type of intellectual property right involved), include a showing that at least one complainant is the owner or exclusive licensee of the subject property;

(8) If the alleged violation involves an unfair method of competition or an unfair act other than infringement of a patent or a registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, state a specific theory underlying the general allegation(s) regarding the existence of a threat or effect to destroy or substantially injure a domestic industry, to prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. Include a statement of facts indicating the threat or effect to substantially injure. The information that should ordinarily be provided includes the volume and trend of production, sales, and inventories of the involved domestic article; a description of the facilities and number and type of workers employed in the production of the involved domestic article; profit-and-loss information covering overall operations and operations concerning the involved domestic article; pricing information with respect to the involved domestic article; when available, volume and sales of imports; and other data pertinent to the subject matter of the complaint that would support the allegation that—

(i) The threat or effect of the importations or sales in question is to destroy or substantially injure an industry in the United States; or

(ii) The threat or effect of the importations or sales in question is to prevent the establishment of an industry in the United States; or

(iii) The threat or effect of the importations or sales in question is to restrain or monopolize trade and commerce in the United States;

(9) Include, when a complaint is based upon the infringement of a valid and enforceable U.S. patent or the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent—

(i) The identification of each U.S. letters patent and a certified copy thereof (a legible copy of each such patent will suffice for each required copy of the complaint);

(ii) The identification of the ownership of each involved U.S. letters patent and a certified copy of each assignment of each such patent (a legible copy thereof will suffice for each required copy of the complaint);

(iii) The identification of each licensee under each involved U.S. letters patent;

(iv) When known, a list of each foreign patent, each foreign patent application (not already issued as a patent), and each foreign patent application that has been denied corresponding to each involved U.S. letters patent, with an indication of the prosecution status of each such foreign patent application;

(v) A nontechnical description of the invention of each involved U.S. letters patent;

(vi) A reference to the specific claims in each involved U.S. letters patent that allegedly cover the article imported or sold by each person named as violating section 337 of the Tariff Act, or the process under which such article was produced;

(vii) A showing of any domestic production of the involved article or of any domestic utilization of the involved process allegedly covered by the above specific claims of each involved U.S. letters patent, and a showing that each person named as violating section 337 of the Tariff Act is importing and/or selling the article covered by, or produced under the involved process covered by, the above specific claims of each involved U.S. letters patent. The complainant shall make such showing by appropriate allegations, and when practicable, by a chart that applies an exemplary claim of each involved U.S. letters patent to a representative involved domestic article or process and to a representative involved article of each person named as violating section 337 of the Tariff Act or to the process under which such article was produced; and

(viii) Drawings, photographs, or other visual representations of both the involved domestic article or process and the involved article of each person named as violating section 337 of the Tariff Act, or of the process utilized in producing such article, and, when a chart is furnished under paragraph (a)(9)(vii) of this section, the parts of such drawings, photographs, or other visual representations should be labeled so that they can be read in conjunction with such chart; and

(10) *Contain a request for relief sought.* When the complaint contains a request for temporary relief pursuant to subsections (e) or (f) of section 337 of the Tariff Act, a separate motion for temporary relief shall accompany the complaint in accordance with § 210.24(e).

(b) *Submissions of articles as exhibits.* At the time the complaint is filed, when practical and possible, the involved articles shall be submitted as exhibits—both the involved domestic article and that of each person named as violating section 337 of the Tariff Act.

(c) *Additional material to accompany each patent-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by, or produced under a process covered by, the claims of a valid U.S. letters patent the following:

(1) Three (3) copies of each license agreement arising out of each involved U.S. letters patent, except that, to the extent that a standard license agreement is used, three (3) copies of the standard license agreement and a list of the licensees oeprating under such agreement will suffice;

(2) One (1) certified copy of the Patent and Trademark Office file wrapper for each involved U.S. letters patent, plus three (3) additional copies thereof; and

(3) Four (4) copies of each patent and applicable pages of each technical reference mentioned in the file wrapper of each involved U.S. letters patent.

(d) *Additional material to accompany each registered trademark-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a federally registered trademark one (1) certified copy of the trademark registration.

(e) *Additional material to accompany each complaint based on a nonfederally registered trademark.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a nonfederally registered trademark the following:

(1) Information concerning prior attempts to register the alleged trademark; and

(2) Information on the status of current attempts to register the alleged trademark.

(f) *Additional material to accompany each copyright-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a copyright one (1) certified copy of the copyright registration.

(g) *Additional material to accompany each registered mask work-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of a semiconductor chip in a manner that constitutes infringement of a federally registered mask work, one (1) certified copy of the mask work registration.

§ 210.21 The response.

(a) *Time for response.* Except as provided in § 210.24(e)(9) and unless otherwise ordered in the notice of investigation or by the administrative law judge, respondents shall have twenty (20) days from the date of service of the complaint and notice of investigation by the Commission under § 210.13 within which to file a written response to the complaint and the notice of investigation. When the investigation involves a motion for temporary relief under § 210.24(e), the response to the complaint and notice of investigation must be filed concurrently with the response to the motion for temporary relief—*i.e.*, ten (10) days after service of the complaint, notice of investigation, and the motion for temporary relief by the Commission pursuant to § 210.13. (*See* § 210.24(e)(9).)

(b) *Contents of the response.* In addition to conforming to the requirements of § 201.8 of this chapter and § 210.5, each response shall be under oath and signed by respondent or his duly authorized officer, attorney, or agent with the name, address, and telephone number of the respondent and any such officer, attorney, or agent given on the first page of the response. Each respondent shall respond to each allegation in the complaint and in the notice of investigation, and shall set forth a concise statement of the facts constituting each ground of defense. There shall be a specific admission, denial, or explanation of each fact alleged in the complaint and notice, or if the respondent is without knowledge of any such fact, a statement to that effect. Allegations of a complaint and notice not thus answered may be deemed to have been admitted. Each response shall include, when available, statistical data on the quantity and value of imports of the involved article in addition to a statement concerning the respondent's capacity to produce the subject article and the relative significance of the United States market to its operations. Affirmative defenses shall be pleaded with as much specificity as possible in the response. When the alleged unfair methods of competition and unfair acts are based upon the claims of a valid U.S. letters patent, the respondent is encouraged to make the following showing when appropriate:

(1) If it is asserted in defense that the article imported or sold by respondent is not covered by, or produced under a process covered by, the claims of each involved U.S. letters patent, a showing of such noncoverage for each involved claim in each U.S. letters patent in question shall be made, which showing may be made by appropriate allegations and, when practicable, by a chart that applies the involved claims of each U.S. letters patent in question to a representative involved imported article of respondent or to the process under which such article was produced;

(2) Drawings, photographs, or other visual representations of the involved imported article of respondent or the process utilized in producing such article, and, when a chart is furnished under paragraph (b)(1) of this section, the parts of such drawings, photographs, or other visual representations should be labeled so that they can be read in conjunction with such chart; and

(3) If the claims of any involved U.S. letters patent are asserted to be invalid or unenforceable, the basis for such assertion, including, when prior art is relied on, a showing of how the prior art renders each claim invalid or unenforceable and a copy of such prior art.

(c) Submission of article as exhibit. At the time the response is filed, when practical and possible, the involved imported article shall be submitted as an exhibit.

§ 210.22 Amendments to pleadings and notice of investigation.

(a) Amendment of complaint. The complaint may be amended at any time prior to the institution of the investigation. After institution, the complaint may be amended for good cause shown upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation by a change in the scope of the investigation that results from such amendment.

(b) By leave. If and whenever disposition of the issues in an investigation on the merits will be facilitated, the administrative law judge, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to an investigation, may allow appropriate amendments to pleadings. Provided, however, that a motion for amendment of a complaint after the institution of an investigation shall be made to the administrative law judge, who shall grant the motion by filing with the Commission an initial determination, or shall deny the motion by issuing an order directing denial; the motion shall be decided according to the standards of paragraph (a) of this section. A motion for amendment of a notice shall be dealt with as provided with respect to motions for amendment of a complaint.

(c) Conformance to evidence. When issues not raised by the pleadings or notice of investigation, but reasonably within the scope of the pleadings and notice, are considered during the taking of evidence by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and notice. Such amendments of the pleadings and notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time, and shall be effective with respect to all parties who have expressly or impliedly consented.

§ 210.23 Supplemental submissions.

The administrative law judge may, upon reasonable notice and such terms as are just, permit service of a supplemental submission setting forth transactions, occurrences, or events that have taken place since the date of the submission sought to be supplemented and that are relevant to any of the issues involved.

§ 210.24 Motions.

(a) Presentations and disposition. (1) During the period between the institution of an investigation and the assignment of the investigation to a presiding administrative law judge, all motions shall be addressed to the Chief Administrative Law Judge. During the time an investigation is before an administrative law judge, all motions therein shall be addressed to the administrative law judge.

(2) When an investigation is before the Commission, all motions shall be addressed to the Chairman of the Commission. A motion to amend the complaint and notice of investigation to name an additional respondent after institution shall be served on the proposed respondent. All written motions shall be filed with the Commission Secretary and served upon each party.

(b) Content. All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) Responses to motions. Within ten (10) days after service of any written motions, or within such longer or shorter time as may be designated by the administrative law judge or the Commission, a nonmoving party, or in the instance of a motion to amend the complaint or notice of investigation to name an additional respondent after institution, the proposed respondent, shall respond or he may be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the administrative law judge or the Commission.

(d) Motions for extensions. As a matter of discretion, the administrative law judge or the Commission may waive the requirements of this section as to motions for extension of time, and may rule upon such motions ex parte.

(e) Motions for temporary relief. Requests for temporary relief pursuant to subsection (e) or (f) of section 337 of the Tariff Act shall be made through a motion to be filed and adjudicated in accordance with the following provisions.

(1) *Motion accompanying complaint.* (i) A complaint requesting temporary relief pursuant to § 210.20(a)(10) shall be accompanied by a motion that sets forth complainant's request for temporary relief. The motion must contain a detailed statement of specific facts bearing on:

(A) Complainant's probability of success on the merits;

(B) Immediate and substantial harm to the domestic industry in the absence of the requested temporary relief;

(C) Harm, if any, to the proposed respondents if the requested temporary relief is granted; and

(D) The effect, if any, that the issuance of the requested temporary relief would have on the public interest.

(ii) The following documents and information shall be filed along with the motion:

(A) A memorandum of points and authorities in support of the motion;

(B) Affidavits executed by persons with knowledge of the facts specified in the motion; and

(C) All documentary information and other evidence in complainant's possession that complainant intends to submit in support of the motion.

If the complaint and/or the motion for temporary relief contains confidential business information as defined in § 201.6(a), the complainant must follow the procedure outlined in § 210.6(a), § 201.6 (a) and (c), and paragraph (e)(5) of this section.

(2) *Motions filed after the complaint.* A motion for temporary relief may be filed after the complaint, but must be filed prior to the Commission determination under § 210.12 on whether to institute an investigation. A motion filed after the complaint shall contain the information, documents, and evidence described in paragraph (e)(1) of this section, and must also make a showing that extraordinary circumstances exist that warrant temporary relief and that the moving party was not aware, and with due diligence could not have been aware, of those circumstances at the time the complaint was filed. When a motion for temporary relief is filed after the complaint but before the Commission has determined whether to institute an investigation based on the complaint, the 35-day period allotted for review of the complaint and informal investigative activity pursuant to paragraph (e)(8) of this section will begin to run anew from the date on which the motion was filed.

(3) Motions after institution of an investigation. A motion for temporary relief may not be filed after an investigation has been instituted.

(4) Service of the motion by complainant. Notwithstanding the provisions of § 210.13 regarding service of the complaint and motion for temporary relief by the Commission upon institution of an investigation, on the day the complainant files a complaint and motion for temporary relief with the Commission (*see* § 201.8(a)), the complainant must serve nonconfidential copies of both documents (as well as nonconfidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of the government of the country(s) that the proposed respondents represent. The complaint and motion shall be served by the fastest means available. A signed certificate of service must accompany the complaint and motion for temporary relief. If the certificate does not accompany the complaint and the motion, the Secretary shall not accept the complaint or the motion and shall promptly notify the submitter. Actual proof of service (or proof of a serious effort to make service)—*e.g.*, certified mail return receipts, courier or overnight delivery receipts, or other proof of delivery—need not be filed with the complaint and motion, but should be retained by the complainant in the event that the complainant is requested to provide actual proof of service.

(5) Content of the service copies. Any purportedly confidential business information that is deleted from the nonconfidential service copies of the complaint and motion for temporary relief must satisfy the requirements of § 201.6(a) (which defines confidential information for purposes of Commission proceedings). For attachments that are confidential in their entirety, complainant must provide a nonconfidential summary of what the document contains. Despite the redaction of confidential material from the motion for temporary relief and the complaint, the nonconfidential service copies must contain enough factual

information about each element of the violation alleged in the complaint and the motion to enable each proposed respondent to comprehend the allegations against it.

(6) Notice accompanying the service copies. Each service copy of the complaint and motion for temporary relief shall be accompanied by a notice containing the following text:

> Notice is hereby given that the attached complaint and motion for temporary relief will be filed with the U.S. International Trade Commission in Washington, DC on , 19 . However, the filing of the complaint and motion will not institute an investigation on that date, nor will it begin the period for filing responses to the complaint and motion pursuant to 19 CFR 210.21 and 210.24(e)(9).
>
> Upon receipt of the complaint, the Commission will examine the complaint for sufficiency and compliance with 19 CFR 201.8, 210.5, 210.10, and 210.20. The Commission's Office of Unfair Import Investigations will conduct information investigative activity pursuant to 19 CFR 210.11 to identify sources of relevant information and to assure itself of the availability thereof. The motion for temporary relief will be examined for sufficiency and compliance with 19 CFR 201.8, 210.5, and 210.24(e) (1), (4), (5), (6), and will be subject to the same type of preliminary investigative activity as the complaint.
>
> Within thirty-five (35) days after receiving the complaint and motion for temporary relief in accordance with 19 CFR 210.24(e) (1), or within thirty-five (35) days after filing of the motion for temporary relief (if it is filed after the complaint pursuant to 19 CFR 210.24(e)(2)), the Commission will determine whether to institute an investigation on the basis of the complaint and whether to refer the motion for temporary relief to a Commission administrative law judge for issuance of an initial determination in accordance with 19 CFR 210.24(e) (10) and (17). *See* 19 CFR 210.12 and 210.24(e) (1) and (8).
>
> If the Commission determines to conduct an investigation of the complaint and the motion for temporary relief, the investigation will be formally instituted on the date on which the Commission publishes a notice of investigation in the **Federal Register** pursuant to 19 CFR 210.12. If an investigation is instituted, copies of the complaint, the notice of investigation, the motion for temporary relief, and the Commission's rules of Practice and Procedure (19 CFR Parts 210 and 211) will be served on each respondent by the Commission pursuant to 19 CFR 210.13. Responses to the complaint, the notice of investigation, and the motion for temporary relief must be filed within ten (10) days after Commission service thereof, in accordance with 19 CFR 201.8, 210.5, 210.21, and 210.24(e)(9). *See also* 19 CFR 201.14 and 210.7 regarding computation of the 10-day response period.
>
> If, after reviewing the complaint and motion for temporary relief, the Commission determines not to institute an investigation, the complaint and motion will be dismissed and the Commission will notify the complainant and all proposed respondents in writing of the Commission's decision and the reason(s) therefor, pursuant to 19 CFR 210.12.
>
> For information concerning the filing of the complaint and its treatment and to ask general questions concerning section 337 practice and procedure, contact the Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401, Washington, DC 20436, telephone 202-252-1560. Such inquiries will be referred to the Commission investigative attorney assigned to the complaint. (*See also* the Commission's rules of practice and procedure set forth in 19 CFR Parts 210 and 211.)
>
> To learn the date on which the Commission will vote on whether to institute an investigation and the publication date of the notice of investigation (if the Commission decides to institute an investigation), contact the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202-252-1000.
>
> This notice is being provided pursuant to 19 CFR 210.24(e)(6).

(7) *Amendment of the motion.* A motion for temporary relief may be amended at any time prior to the institution of an investigation. However, all material filed to amend the motion (or the complaint) must be served on all proposed respondents and on the embassies in Washington, DC, of the foreign governments that they represent, in accordance with paragraph (e)(4) of this section. If the amendment expands the scope of the motion, the 35-day period allotted under paragraph (e)(8) of this section for determining whether to institute an investigation and to initiate temporary relief proceedings shall begin to run anew from the date the amendment is filed with the Commission. Motions for temporary relief may not be amended after an investigation is instituted.

(8) *Provisional acceptance of the motion.* The Commission shall determine whether to accept a motion for temporary relief at the same time it determines whether to institute an investigation on the basis of the complaint. That determination shall be made within thirty-five (35) days after the complaint and motion for temporary relief are filed. Before the Commission determines whether to provisionally accept a motion for temporary relief, the motion will be examined for sufficiency and compliance with paragraphs (e) (1), (4), (5), and (6) of this section and §§ 201.8, 210.5 of this chapter, and will be subject to the same type of preliminary investigative activity as the complaint (see § 210.11(b)). Acceptance of a motion pursuant to this paragraph constitutes provisional acceptance for referral of the motion to an administrative law judge for an initial determination pursuant to paragraph (e)(17) of this section. Commission rejection of an insufficient or improperly filed complaint will preclude acceptance of a motion for temporary relief. However, Commission rejection of a motion for temporary relief will not preclude institution of an investigation of the complaint.

(9) *Responses to the motion and the complaint.* Any party may file a response to a motion for temporary relief. Responses shall be filed within ten (10) days after service of the motion by the Commission upon institution of an investigation, unless otherwise ordered by the administrative law judge. The response must comply with the requirements of § 201.8 of this chapter and § 210.5, and shall contain the following information:

(i) A statement that sets forth with particularity any objection to the motion for temporary relief;

(ii) A statement that sets forth with specificity facts bearing on:

(A) Complainant's probability of success on the merits;

(B) Immediate and substantial harm, if any, to the domestic industry in the absence of the requested temporary relief;

(C) Harm, if any, to the proposed respondents if the requested temporary relief is granted; and

(D) The effect, if any, that issuance of the requested temporary relief would have on the public interest;

(iii) a memorandum of points and authorities in opposition to the motion;

(iv) affidavits, where possible, executed by persons with knowledge of the facts specified in the response.

Each response to the motion for temporary relief must also be accompanied by a response to the complaint and notice of investigation. Responses to the complaint and notice of investigation must comply with § 201.8 of this chapter and §§ 210.5 and 201.21.

(10) *Referral to an administrative law judge.* Following provisional Commission acceptance of a motion for temporary relief and upon institution of an investigation, the motion for temporary relief shall be forwarded to an administrative law judge for an initial determination on whether there is reason to believe there is a violation of section 337 of the Tariff Act and whether temporary relief is appropriate.

(11) *Designating an investigation "more complicated" for the purpose of adjudicating a motion for temporary relief.* At the time the Commission

determines to institute an investigation and provisionally accepts a motion for temporary relief pursuant to paragraph (a)(8) of this section, the Commission may designate the investigation "more complicated" pursuant to § 210.59(b) for the purpose of obtaining additional time to adjudicate the motion for temporary relief. In the alternative, after the motion for temporary relief is referred to the administrative law judge for an initial determination under paragraphs (e)(10) and (17) of this section, the administrative law judge may issue an order, sua sponte or on motion, designating the investigation "more complicated" for purpose of obtaining additional time to adjudicate the motion for temporary relief. Such order shall constitute a final determination of the Commission, and notice of the order shall be published in the **Federal Register**.

(12) *Discovery and compulsory process.* The administrative law judge shall place such limits upon the kind or amount of discovery to be had or the period of time during which discovery may be carried out as shall be consistent with the time limitation set forth in paragraph (e)(17) of this section relating to issuance of an initial determination concerning the motion for temporary relief. The administrative law judge's authority to compel discovery includes discovery relating to the following issues:

(i) The effect, if any, that issuance of the relief requested in the motion would have on the public interest;

(ii) The form of temporary relief the Commission should issue if it determines to grant temporary relief;

(iii) Whether the public interest factors enumerated in the statute preclude that form of relief; and

(iv) The amount of the bond under which the respondent(s)'s merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission.

As part of the standard analysis for determining whether to grant a motion for temporary relief (see paragraphs (e)(1) and (9) of this section), the administrative law judge should make findings on the issue specified in paragraph (e)(12)(i) of this section. The administrative law judge may, but is not required, to make findings on issues specified in paragraphs (e)(12) (ii), (iii), and (iv) of this section. Evidence and information obtained through discovery on those issues will be used by the parties and considered by the Commission in the context of the parties' written submissions on remedy, the public interest, and bonding to be filed with the Commission pursuant to paragraph (e)(18) of this section.

(13) *Evidentiary hearing.* A motion for temporary relief may be ruled upon without a hearing by the administrative law judge when a motion for summary determination under § 210.50(a) is granted in favor of respondents or other parties opposing the motion for temporary relief, or if the administrative law judge determines that the motion should be dismissed for some other reason (*e.g.*, failure to comply with some portion of paragraph (e)(1) of this section). (Such rulings by the administrative law judge shall be in the form of an initial determination issued under paragraph (e)(17) of this section.) If a hearing is conducted, the precise form and scope of the hearing are left to the discretion of the administrative law judge. At the hearing or as directed by the administrative law judge, the parties shall address the issues of whether there is reason to believe that there is a violation of section 337 of the Tariff Act and whether temporary relief is appropriate. The administrative law judge may, but is not required, to take evidence at the hearing concerning the remedy, public interest, and bonding issues specified in paragraphs (e)(12) (ii), (iii), and (iv) of this section. However, as part of the standard analysis for determining whether to grant or deny a motion for temporary relief (see paragraphs (e)(1) and (9) of this section), the ALJ should take evidence on the question of what effect the form of relief requested in the motion would have on the public interest.

(14) *Proposed findings and conclusions and briefs.* The administrative law judge shall determine whether and, if so, to what extent the parties shall be permitted to file proposed findings of fact, proposed conclusions of law, and/or briefs (pursuant to § 210.52) concerning the grant or denial of temporary relief.

(15) *Interlocutory appeals and review by the Commission.* There will be no interlocutory appeals to the Commission (pursuant to § 210.71) of the administrative law judge's ruling on any matter delegated to him or her for decision under paragraph (e) of this section. After the administrative law judge has certified to the Commission pursuant to paragraphs (e) (16) and (17) of this section an initial determination granting or denying a motion for temporary relief and the administrative record upon which the initial determination is based, the Commission's review of the administrative law judge's actions and rulings relating to the motion for temporary relief is limited to the issues specified in paragraph (e) (17) of this section.

(16) *Certification of the record.* At the close of the reception of evidence in any hearing held pursuant to paragraph (e)(13) of this section or as soon as possible thereafter, the administrative law judge shall certify the record to the Commission prior to issuance of the initial determination concerning temporary relief. However, if such advance certification is not feasible, the record shall be certified to the Commission when the administrative law judge issues the initial determination concerning the grant or denial of temporary relief, in accordance with paragraph (e)(17) of this section.

(17) *Initial determination concerning temporary relief and Commission action thereon.*

(i) On the 70th day after publication of the notice of investigation in an ordinary investigation, or on the 120th day after such publication in a "more complicated" investigation, the administrative law judge will issue an initial determination concerning temporary relief—*i.e.*, whether there is reason to believe that respondents have violated section 337 of the Tariff Act and, if so, whether temporary relief should be issued. The initial determination may, but is not required, to address the remedy, public interest, and bonding issues specified in paragraphs (e)(12) (ii), (iii), and (iv) of this section. However, as part of the standard analysis for determining whether to grant or deny a motion for temporary relief (see paragraphs (e) (1) and (9) of this section), the initial determination shall address the question for what effect the form of relief requested in the motion would have on the public interest (except when the initial determination is granting a summary determination denying the motion for temporary relief pursuant to paragraph (e)(13) of this section).

(ii) The initial determination will become the Commission's determination twenty (20) calendar days after issuance thereof in an ordinary case, and thirty (30) calendar days after issuance in a "more complicated" investigation unless the Commission modifies or vacates the initial determination within that period. Such modification or vacation may be ordered on the basis of errors of law or for policy reasons articulated by the Commission. The existence of alleged errors of fact will not be considered. In computing the aforesaid 20-day and 30-day deadlines, intermediary Saturdays, Sundays, and holidays shall be included. However, if the last day of the period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the filing deadline shall be extended to the next business day. Because of the time constraints imposed by the statutory deadlines for determining whether to order temporary relief under section 337 of the Tariff Act, the additional time ordinarily allotted under § 210.16(d) of this chapter cannot be provided.

(iii) In order to assist the Commission to determine whether modification or revocation of the initial determination is warranted, all parties may file written comments concerning the presence (or absence) of errors of law in the initial determination and/or policy reasons that justify such action (or show that it would not be justified). Such comments will be limited to thirty (30) pages and must be filed no later than seven (7) calendar days after service of the initial determination in an ordinary case and ten (10) calendar days after service of the initial determination in a "more complicated" investigation. In computing the aforesaid 7-day and 10-day deadlines, intermediary Saturdays, Sundays, and holidays shall be included. However, if the last day of the period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this Chapter, the filing deadline shall be extended to the next business day. Because of the time constraints imposed by the statutory deadlines for determining whether to order temporary relief under section 337 of the Tariff Act, the additional time ordinarily allotted under § 210.16(d) of this chapter cannot be provided.

(iv) Nonconfidential copies of the initial determination also will be served on other agencies, and they will be given ten (10) calendar days in which to file comments on the initial determination.

(v) Each party may file a response to other parties' comments within ten (10) calendar days after issuance of the initial determination in an ordinary case—and within fourteen (14) calendar days after issuance of an initial determination in a "more complicated" investigation. The reply comments will be limited to fifteen (15) pages. If the last day of the 10-day or 14-day period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the filing deadline shall be extended to the next business day. Because of the constraints imposed by the statutory deadlines, additional time ordinarily allotted under § 201.16(d) of this chapter will not be provided. The parties are expected to facilitate the filing of timely and useful responses to each other's initial comments by serving the initial comments by the fastest means available.

(vi) If the Commission determines to modify or vacate the initial determination within twenty (20) calendar days after issuance thereof in an ordinary case, or thirty (30) calendar days after issuance in a "more complicated" case, a notice and (if appropriate) a Commission opinion will be issued. If the Commission does not modify or vacate the administrative law judge's initial determination within the time provided, the initial determination will automatically become the determination of the Commission and a notice of that fact will not be issued.

(18) *Remedy, the public interest, and bonding.* The procedure for arriving at the Commission's determination of the issues of the appropriate form of temporary relief, whether the public interest factors enumerated in the statute preclude such relief, and the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission, is as follows:

(i) While the motion for temporary relief is before the administrative law judge, he may compel discovery on matters relating to remedy, the public interest, and bonding (as provided in paragraph (e)(12) of this section). The administrative law judge also is authorized to make findings pertaining to the public interest, as provided in paragraph (e)(17) of this section. However, such findings may be superceded by Commission findings on that issue as provided in paragraph (e)(18)(iii) of this section.

(ii) On the 60th day after institution in an ordinary case or on the 105th day after institution in a "more complicated" investigation, all parties may file written submissions with the Commission addressing those issues. The submissions shall refer to information and evidence already on the record, but additional information and evidence germane to the issues of appropriate relief, the statutory public interest factors, and bonding may be provided along with the parties' submissions.

(iii) On or before the 90-day or 150-day statutory deadline for determining whether to order temporary relief under subsection (b) of section 337 of the Tariff Act, the Commission will determine what relief is appropriate in light of any violation that appears to exist, whether the public interest factors enumerated in the statute preclude the issuance of such relief, and the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission. In the event that Commission's findings on the public interest pursuant to paragraph (e)(18) of this section are inconsistent with findings made by the administrative law judge in the initial determination pursuant to paragraph (e)(17) of this section, the Commission's findings are controlling.

§ 210.25 Default.

(a) *Definition of default.* Failure of a respondent to take actions including but not limited to the following may be deemed to constitute a waiver of the respondent's right to appear, to be served with documents, and to contest the allegations at issue in the investigation: file a response to the complaint and notice pursuant to § 210.21 (or § 210.24(e)(9)) within the time provided, respond to a motion for summary determination, respond to a motion that materially alters the scope of the investigation, or appear at a hearing before the administrative law judge on the issue of violation of section 337 of the Tariff Act.

(b) *Procedure for determining default.* If a respondent has failed to respond or appear in the manner described in paragraph (a) of this section, the administrative law judge upon motion of his own initiative shall order such respondent to show cause why it should not be found in default. If the respondent fails to show cause why it should not be found in default, the administrative law judge may make any orders appropriate to paragraph (a) of this section.

(c) *Relief against a respondent in default.* The complainant shall declare at the time the last remaining respondent is found to be in default whether the complainant is seeking a general or limited exclusion order, or a cease and desist order, or both. In cases in which the complainant is seeking relief solely affecting the respondent found to be in default, the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion order or cease and desist order, or both, which affects only that respondent unless, after considering the effect of such order(s) upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, the Commission finds that the order should not be issued. In cases in which the record developed by the administrative law judge contains substantial, reliable, and probative evidence of a violation of section 337 of the Tariff Act, the Commission may issue a general exclusion order (in addition to or in lieu of cease and desist orders) regardless of the source or importer of the articles concerned, unless the public interest considerations enumerated above preclude such relief. In considering whether a prima facie case of violation of section 337 has been presented, the administrative law judge and the Commission may draw appropriate adverse inferences as provided in § 210.36 against a respondent or respondents in default with respect to those issues for which complainant has made a good faith but unsuccessful effort to obtain evidence.

§ 210.26 Intervention.

Any person desiring to intervene in an investigation under this part shall make written application in the form of a motion setting forth a sufficient basis therefore. Such application shall have attached to it a certificate showing service thereof upon each party to the investigation in accordance with the provisions of § 210.16 of this chapter. A similar certificate shall be attached to the answer filed by any party with respect to the application showing service of such answer upon the applicant and all other parties. The Commission, or the administrative law judge by initial determination, may permit the intervention of such person to such extent and upon such terms as may be deemed proper under the circumstances.

Subpart D—Discovery and Compulsory Process

§ 210.30 General provisions governing discovery.

(a) Discovery methods. The parties to an investigation may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions, interrogatories, production of documents or things for inspection and other purposes, requests for admissions, and entry upon land or other property.

(b) Scope of discovery. Unless otherwise ordered by the administrative law judge, a party may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearings if the information sought appears reasonably calculated to lend to the discovery of admissible evidence.

(c) Discovery and compulsory process. The administrative law judge shall place such limits upon the kind or amount of discovery to be had or the period of time during which discovery may be carried out as shall be consistent with the time limitations set forth in § 210.24(e)(17) relating to the issuance of initial determinations concerning motions for temporary relief or in § 210.53(a) relating to the issuance of initial determinations concerning whether there is a violation of section 337 of the Tariff Act.

(d) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty to seasonably supplement his response with respect to any question directly addressed to—

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at a hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty to seasonably amend a prior response if he obtains information upon the basis of which—

(i) He knows that the response was incorrect when made; or

(ii) He knows that the response, though correct when made, is no longer true, and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the administrative law judge, agreement of the parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

§ 210.31 Depositions.

(a) When depositions may be taken. After the date of publication in the **Federal Register** of the notice instituting the investigation, any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions. Leave of the administrative law judge must be obtained only if the complainant seeks to take a deposition prior to the expiration of twenty (20) days after the date of service of the complainant and notice of investigation.

(b) Persons before whom depositions may be taken. Depositions may be taken before a person having power to administer oaths by the laws of the United States or of the place where the examination is held.

(c) Notice of examination. A party desiring to take the deposition of a person shall give notice in writing to every other party to the investigation of not less than ten (10) days if the deposition is to be taken within the United States, and not less than fifteen (15) days if the deposition is to be taken elsewhere. The administrative law judge may designate a shorter or longer time. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. A notice may provide for the taking of testimony by telephone, but the administrative law judge may, on motion of any party, require that the deposition be taken in the presence of the deponent. The parties may stipulate in writing, or the administrative law judge may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(d) Taking of deposition. Each deponent shall be duly sworn, and any adverse party shall have the right to cross-examine. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. Evidence objected to shall be taken subject to the objections, except that privileged communications and subject matter need not be disclosed. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, after which the deposition shall be subscribed by the deponent (unless the parties by stipulation waive signing or the deponent is ill or cannot be found or refuses to sign) and certified by the person before whom the deposition was taken. If the deposition is not subscribed by the deponent, the person administering the oath shall state on the record such fact and the reasons therefor. When a deposition is recorded by stenographic means, the stenographer shall certify on the transcript that the witness was sworn in

the stenographer's presence and that the transcript is a true record of the testimony of the witness. When a deposition is recorded by other than stenographic means and is thereafter transcribed, the person transcribing it shall certify that the person heard the witness sworn on the recording and that the transcript is correct writing of the recording. Thereafter, that person shall forward one (1) copy to each party who was present or represented at the taking of the deposition.

(e) Depositions of nonparty officers or employees of the Commission or of other Government agencies. A party desiring to take the deposition of an officer or employee of the Commission other than the Commission investigative attorney, or of an officer or employee of another Government agency, or to obtain documents or other physical exhibits in the custody, control, and possession of such officer or employee, shall proceed by written motion to the administrative law judge for leave to apply for a subpoena under § 210.35(c). Such a motion shall be granted only upon a showing that the information expected to be obtained thereby is within the scope of discovery permitted by § 210.30(b) and cannot be obtained without undue hardship by alternative means.

(f) Filing of depositions. The party taking the deposition shall file one (1) copy thereof with the Commission investigative attorney, and shall give prompt notice of such filing to all other parties.

(g) Admissibility of depositions. The fact that a deposition is taken and filed with the Commission investigative attorney as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the investigation. Only such part of a deposition as is received in evidence at a hearing shall constitute a part of the record in such investigation upon which a determination may be based. Objections may be made at the hearing to receiving in evidence any deposition or part thereof for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

(h) Use of depositions. A deposition may be used as evidence against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisons:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness,

(2) The deposition of a party may be used by an adverse party for any purpose,

(3) The deposition of a witness, whether or not a party, may be used by any party for any purposes if the administrative law judge finds—

(i) That the witness is dead; or

(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at a hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

§ 210.32 Interrogatories.

(a) Scope; use at hearing. Any party may serve upon any other party written interrogatories to be answered by the party served. Interrogatories may relate to any matters that can be inquired into under § 210.30(b), and the answers may be used to the extent permitted by the rules of evidence.

(b) Procedure. (1) Interrogatories may be served upon any party after the date of publication in the **Federal Register** of the notice of investigation.

(2) Parties answering interrogatories shall repeat the interrogatories being answered immediately preceding the answers. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within ten (10) days after the service of the interrogatories. The administrative law judge may allow a shorter or longer time. The party submitting the interrogatories may move for an order under § 210.36(a) with respect to any objection to or other failure to answer an interrogatory.

(3) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or a later time.

(c) Option to produce records. When the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specifications provided shall include sufficient detail to permit the interrogating party to identify readily the documents from which the answer may be ascertained.

§ 210.33 Request for production of documents and things and entry upon land.

(a) Scope. Any party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 210.30(b).

(b) Procedure. (1) The request may be served upon any party after the date of publication in the **Federal Register** of the notice of investigation. The request shall set forth the items to be inspected, either by individual item or by category, and

describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within ten (10) days after the service of the request. The administrative law judge may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of any item or category, the part shall be specified. The party submitting the request may move for an order under § 210.36(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request.

(c) Persons not parties. This rule does not preclude issuance of an order against a person not a party to permit entry upon land.

§ 210.34 Request for admission.

(a) Form, content, and service of request for admission. Any party may serve on any other party a written request for admission of the truth of any matters relevant to the investigation and set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter as to which an admission is requested shall be separately set forth. The request may be served upon a party whose complaint is the basis for the investigation after the date of publication in the **Federal Register** of the notice of investigation. The request may be served upon any other party at any time twenty (20) days after the date of service of complaint and notice of investigation, unless leave of the administration law judge is obtained to serve the request at an earlier date.

(b) Answers and objections to requests for admissions. A party answering a request for admission shall repeat the request for admission immediately preceding his answer. The matter may be deemed admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter as to which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known to or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter as to which an admission has been requested presents a genuine issue for a hearing may not object to the request oin that ground alone; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) Sufficiency of answers. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to a hearing under this Part.

(d) Effect of admissions; withdrawal or amendment of admission. Any matter admitted under this rule may be conclusively established unless the administrative law judge on motion permits withdrawal or "amendment" of the admission. The administrative law judge may permit withdrawal or amendment when the presentation of the issues of the investigation will be subserved thereby and the party who obtained the admission fails to satisfy the administrative law judge that withdrawal or amendment will prejudice him in maintaining his position on the issues of the investigation. Any admission made by a party under this section is for the purpose of the pending investigation only and is not an admission by him for any other purpose not may it be used against him in any other proceeding.

§ 210.35 Subpoenas

(a) Application for issuance of a subpoena.—(1) Subpoena ad testificandum. An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge.

(2) Subpoena duces tecum. An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(b) Use of subpoena for discovery. Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that are in the possession, custody, or control of such person.

(c) Application for subpoenas for nonparty Commission records or personnel or for records and personnel of other Government agencies. (1) Procedure. An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Commission, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent

could not be obtained without undue hardship or by alternative means.

(2) Ruling. Such applications shall be ruled upon by the administrative law judge. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) Application for subpoena grounded upon the Freedom of Information Act. No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge.

(d) Motion to limit or quash. Any motion to limit or quash a subpoena shall be filed within ten (10) days after service thereof, or within such other time as the administrative law judge may allow.

(e) Ex parte rulings on applications for subpoenas. Applications for the issuance of the subpoenas pursuant to the provisions of this section may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the administrative law judge.

§ 210.36 Failure to make discovery; sanctions

(a) Motion for order compelling discovery. A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) Failure to comply with order compelling discovery. If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to, the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material, in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both. Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

§ 210.37 Protective Orders.

(a) Issuance of protective order. Upon motion by a party or by the person from whom discovery is sought or by the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may make any order that may appear necessary and appropriate for the protection of the public interest or that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That discovery not be had:

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the administrative law judge;

(6) That a deposition, after being sealed, be opened only by order of the Commission or the administrative law judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or the administrative law judge.

If the motion for a protective order is denied, in whole or in part, the Commission or the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(b) Unauthorized disclosure of information. If confidential business information submitted in accordance with the terms of a protective order is disclosed to any person other than in a manner authorized by the protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the submitter of the information and the administrative law judge or the Commission, and, without prejudice to other rights and remedies of the submitter of the information, make every effort to prevent further disclosure of such information by the party or the recipient of such information.

(c) Violation of protective order. Any individual who has agreed to be bound by the terms of a protective order issued pursuant to paragraph (a) of this section, and who is determined by the Commission or the administrative law judge to have violated the terms of the protective order may be subject to one or more of the following penalties:

(1) An official reprimand by the Commission;

(2) Disqualification from or limitation of further participation in a pending investigation;

(3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;

(4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;

(5) Sanctions as enumerated in § 210.36, or such other action as may be appropriate.

Such sanctions may be imposed upon the filing of a motion by a party or upon the administrative law judge's own motion. The administrative law judge shall allow the parties to make written submissions and if warranted to present oral argument. The administrative law judge shall grant or deny a motion for sanctions by filing with the Commission an initial determination pursuant to § 210.53(c).

Subpart E—Prehearing Conferences and Hearings

§ 210.40 Prehearing conferences.

(a) When appropriate. The administrative law judge in any investigation may direct counsel or other representatives for all parties to meet with him for one or more conferences to consider any or all of the following:

(1) Simplification and clarification of the issues:

(2) Scope of the hearing;

(3) Necessity or desirability of amendments to pleadings subject, however, to the provisions of § 210.22;

(4) Stipulations and admissions of either fact or the content and authenticity of documents;

(5) Expedition in the discovery and presentation of evidence including, but not limited to, restriction of the number of expert, economic, or technical witnesses; and

(6) Such other matters as may aid in the orderly and expeditious disposition of the investigation including disclosure of the names of witnesses and the exchange of documents or other physical exhibits that will be introduced in evidence in the course of the hearing.

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on subpoenas duces tecum issued pursuant to the provisions of § 210.35(a)(2).

(c) *Reporting.* In the discretion of the administrative law judge, prehearing conferences may or may not be stenographically reported and may or may not be public.

(d) *Order.* The administrative law judge may enter in the record an order that recites the results of the conference. Such order shall include the administrative law judge's rulings upon matters considered at the conference, together with appropriate direction to the parties. The administrative law judge's order shall control the subsequent course of the hearing, unless modified to prevent manifest injustice.

§ 210.41 General provisions for hearings.

(a) *Purpose of hearings.* Unless otherwise ordered by the Commission:

(1) An opportunity for a hearing shall be provided in each investigation under section 337 of the Tariff Act to take evidence and hear argument for the purpose of determining whether there is a violation of section 337 of the Tariff Act.

(2) Except as provided under § 210.24(e)(13), an opportunity for a hearing shall also be provided to take evidence and hear argument for the purpose of determining whether there is reason to believe there is a violation of section 337 of the Tariff Act.

(b) *Public hearings.* All hearings in investigations under this Part shall be public unless otherwise ordered by the administrative law judge.

(c) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place, continuing until completed unless otherwise ordered by the administrative law judge.

(d) *Rights of the parties.* Every party shall have the right of due notice, cross examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(e) *Presiding official.* An administrative law judge shall preside over each hearing unless the Commission shall otherwise order.

§210.42 Evidence.

(a) *Burden of proof.* The proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded as far as practicable.

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by the Commission investigative attorney when necessary in connection with investigations and may be offered in evidence by the Commission investigative attorney.

(d) *Official notice.* When any decision of the administrative law judge rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall be made in timely fashion and shall briefly state the grounds relied upon. Rulings on all objections shall appear on the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining party may make a specific offer of what he expects to prove by the answer of the witness, or the administrative law judge may in his discretion receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained with the record so as to be available for consideration by any reviewing authority.

§ 210.43 Record.

(a) *Definition of the record.* The record shall consist of all pleadings, the notice of investigation, motions and responses, and other documents and things properly filed with the Secretary in accordance with § 210.5(b), in addition to all orders, notices, and initial determinations of the administrative law judge, orders and notices of the Commission, hearing and conference transcripts, evidence admitted into the record, and any other items certified into the record by the administrative law judge or the Commission.

(b) *Reporting and transcription.* Hearings shall be reported and transcribed by the official reporter of the Commission under the supervision of the administrative law judge, and the transcript shall be a part of the record.

(c) *Corrections.* Corrections of the transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the administrative law judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel and approved by the administrative law judge shall be included in the record, and such stipulations, except to the extent that they are capricious or without substance, shall be approved by the administrative law judge. Corrections shall not be ordered by the administrative law judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute typed pages, under the usual certificate of the reporter, for insertion in the transcript. The original uncorrected pages shall be retained in the files of the Commission.

(d) *Certification of record.* Except as provided in § 210.24(e)(16) in connection with the disposition of motions for temporary relief, the record shall be certified to the Commission by the administrative law judge upon his filing of an initial determination or at such earlier time as the Commission may order.

§ 210.44 In camera treatment of confidential information.

(a) *Definition.* Except as hereinafter provided and consistent with §§ 210.6 and 210.37, confidential documents and testimony made subject to protective orders or orders granting in camera treatment are not made part of the public record and are kept confidential in an in camera record. Only the persons identified in a protective order, persons identified in § 210.6(b), and court personnel concerned with judicial review shall have access to confidential information on the in camera record. The right of the adminstrative law judge and the Commission to disclose confidential data under a protective order (pursuant to § 210.37) to the extent necessary for the proper disposition of each proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* The administrative law judge shall have authority to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed in camera.

(c) *Part of confidential record.* In camera documents and testimony shall constitute a part of the confidential record of the Commission.

(d) *References to in camera information.* In the submittal of proposed findings, briefs, or other papers, counsel for all parties shall make an attempt in good faith to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of in camera data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked "Business Confidential," which shall be placed in camera and become a part of the confidential record.

(e) *Motions to declassify.* Any party may move to declassify documents (or portions thereof) that have been designated confidential by the submitter but that do not satisfy the confidentiality criteria set forth in § 201.6(a). All such motions, whether brought at any time during the investigation or after conclusion of the investigation shall be addressed to and ruled upon by the presiding administrative law judge, or if the investigation is not before a presiding administrative law judge, by the chief administrative law judge or such administrative law judge as he or she may designate.

Subpart F—Determinations and Actions Taken

§ 210.50 Summary determinations.

(a) *Motions for summary determinations.* Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation. Counsel or other representatives in support of the complaint may so move at any time after twenty (20) days following the date of service of the complaint and notice instituting the investigation, and any other party, or a respondent, may so move at any time after the date of publication in the **Federal Register** of the notice of investigation. Any such motion by any party, however, must be filed at least thirty (30) days before the date fixed for any hearing provided for in § 201.41.

(b) *Opposing affidavits; oral argument; time and basis for determination.* Any nonmoving party may, within ten (10) days after service of the motion, file opposing affidavits. The administration law judge may in his discretion or may at the request of any party set the matter for oral argument and call for the submission of briefs or memoranda. The determination sought by the moving party shall be rendered if the pleadings and any depositions, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

(c) *Affidavits.* Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The administrative law judge may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary determination is made and supported as provided in this rule, a party opposing the motion may not rest upon mere allegations or denials in his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for hearing. If no such response is filed, a summary determination, if appropriate, shall be rendered.

(d) *Refusal of application for summary determination; continuances and other orders.* Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present facts essential to justify his opposition, the administrative law judge may refuse the application for summary determination or may order a continuance to permit affidavits to be obtained or depositions or other discovery to be had, or make such other order as is appropriate, and a ruling to that effect shall be made a matter of record.

(e) *Order establishing facts.* If on motion under this rule a summary determination is not rendered upon all the allegations for all the relief asked and a hearing is necessary, the administrative law judge shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the investigation. The facts so specified shall be deemed established.

(f) *Order of summary determination.* An order of summary determination shall constitute an initial determination of the administrative law judge under § 210.53 or § 210.24(e)(17).

§ 210.51 Termination of investigation.

(a) *Motions for termination.* Any party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents.

(b) *Settlement by licensing or other agreement.* (1) An investigation before the Commission may be terminated as provided in paragraph (a) of this section and pursuant to subsection (c) of section 337 of the Tariff Act on the basis of a licensing or other settlement agreement entered into between the complainant (all of the complainants if there is more than one) and one or more of the respondents. A motion for termination by such parties shall contain copies of the licensing or other settlement agreement, and any agreements supplemental thereto, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. If the licensing or other settlement agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the agreement with such information deleted shall accompany the motion.

(2) The motion, licensing or other agreement, and any agreements supplemental thereto, shall be certified by the administrative law judge to the Commission with an initial determination regarding the motion for termination. If the licensing or other agreement or the initial determination contains confidential business information, copies of the agreement and initial determination with confidential business information deleted shall be certified to the Commission simultaneously with the confidential versions of such documents.

The Commission shall promptly publish a notice in the **Federal Register** stating that an initial determination has been received terminating the respondent or respondents in question on the basis of a licensing or other settlement agreement, that nonconfidential versions of the initial determination and the agreement are available for inspection in the Office of the Secretary, and that interested persons may submit written comments concerning termination of the respondents in question within ten (10) days of the date of publication of the notice in the **Federal Register**. In accordance with subsection (c) of section 337 of the Tariff Act, an order of termination based upon such licensing or other settlement agreement need not constitute a determination as to violation of section 337.

(c) *Settlement by consent order.* An investigation before the Commission may be terminated as provided in paragraph (a) of this section and pursuant to subsection (c) of section 337 of the Tariff Act on the basis of a consent order settlement under § 211.20(b) of this chapter. In accordance with subsection (c) of section 337 of the Tariff Act, an order of termination based upon such a settlement need not constitute a determination as to violation of section 337.

(d) *Effect of termination.* Except as provided in paragraphs (b) and (c) of this section, an order of termination issued by the Commission shall constitute a determination of the Commission under § 210.56(c), and an order of termination issued by the administrative law judge shall constitute an initial determination under § 210.53.

§ 210.52 Proposed findings and conclusions.

At the time a motion for summary determination under § 210.50(a) or a motion for termination under § 210.51(a) is made, or when it is found that a party is in default under § 210.25, or at the close of the reception of evidence in any hearing held pursuant to this part (except as provided in § 210.24(e)(14)), or within a reasonable time thereafter fixed by the administrative law judge, any party may file proposed findings of fact and conclusions of law, together with reasons therefor. When appropriate, briefs in support of the proposed findings of fact and conclusions of law may be filed with the administrative law judge for his consideration. Such proposals and briefs shall be in writing, shall be served upon all parties in accordance with § 210.08, and shall contain adequate references to the record and the authorities on which the submitter is relying.

§ 210.53 Initial determination.

(a) *On issues concerning permanent relief.* Except as may otherwise be ordered by the Commission, within nine (9) months, or within fourteen (14) months in a more complicated case, of the date of publication in the **Federal Register** of the notice of investigation, the administrative law judge shall certify the record to the Commission and shall file with the Commission an initial determination as to whether there is a violation of section 337 of the Tariff Act.

(b) *On issues concerning temporary relief.* The disposition of an initial determination concerning temporary relief is governed by the provisions of § 210.24(e)(17).

(c) *On motions for summary determination, termination, finding of default, intervention, amendment to the complaint, or notice of investigation, a "more complicated" designation (except as provided in § 210.24(e)(11)), a "complicated" designation, suspension of an investigation, or sanctions for violation of a protective order.* (1) The administrative law judge shall grant by filing with the Commission an initial determination or shall deny by issuing an order directing denial the following types of motions after they have been filed: a motion for summary determination pursuant to § 210.50; a motion for termination pursuant to § 210.51; a motion for a finding of default pursuant to § 210.25; a motion for intervention pursuant to § 210.26; a motion to amend the complaint or notice of investigation pursuant to § 210.22; a motion to designate an investigation "more complicated" pursuant to § 210.59(a) (except as provided in § 210.24(e)(11)); a motion to designate an investigation "complicated" pursuant to § 210.59(b); or a motion to suspend an investigation pursuant to § 210.59 (a) or (b).

(2) Following a motion for a sanction for violation of a protective order § 210.37, the administrative law judge shall grant or deny such motions by filing with the Commission an initial determination.

(d) *Contents.* The initial determination shall include: an opinion stating findings (with specific page references to principal supporting items of evidence in the record) and conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record; and a statement that pursuant to § 210.53(h) of these rules, the initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to § 210.54 or the Commission pursuant to § 210.55 orders on its own motion a review of the initial determination or certain issues therein.

(e) *Notice to and advice from departments and agencies.* The Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as the Commission deems appropriate shall be served with a copy of the initial determination. The Commission shall consider comments, limited to issues raised by the record, the initial determination, and the petitions for review, received from such agencies when deciding whether to initiate review or the scope of review. The Commission shall allow such agencies twenty (20) days after the service of an initial determination filed pursuant to § 210.53(a) or ten (10) days after the service of an initial determination filed pursuant to § 210.53 (b) or (c) to submit their comments.

(f) *Initial determination made by the administrative law judge.* The initial determination shall be made and filed by the administrative law judge who presided over the investigation, except when that person is unavailable to the Commission.

(g) *Reopening of proceedings by the administrative law judge.* At any time prior to the filing of the initial determination, the administrative law judge may reopen the proceedings for the reception of additional evidence.

(h) *Effect.* An initial determination filed pursuant to § 210.53(a) shall become the determination of the Commission forty-five (45) days after the date of service of the initial determination, unless the Commission, within forty-five (45) days after the date of such service shall have ordered review of the initial determination or certain isues therein pursuant to § 210.54(b) or § 210.55, or by order shall have changed the effective date of the initial determination. An initial determination filed pursuant to § 210.53 (b) or (c) shall become the determination of the Commission thirty (30) days after the date of service of the initial determination, except that the disposition of an initial determination granting or denying a motion for temporary relief is governed by the provisions of § 210.24(e).

(i) *Notice of determination.* Except as provided in § 210.24(e)(17), in the event an initial determination becomes the determination of the Commission, the parties shall be notified thereof by the Secretary.

§ 210.54 Petition for review.

(a) *The petition and responses.* (1) Except as provided in § 210.24(e)(17), any party to an investigation may request a review by the Commission of an initial determination by filing with the Secretary a petition for review, except that a party who has defaulted may not petition for review of any issue regarding which the party is in default. A petition for review of an initial determination filed pursuant to § 210.53(a) shall be filed within ten (10) days after the service of the initial determination. A petition for review of an initial determination filed pursuant to § 210.53(c) shall be filed within five (5) days after the service of the initial determination, except that a party or proposed respondent who has not responded to the motion before the administrative law judge pursuant to § 210.24(c) may be deemed to have consented to the relief requested and may not petition for review of the issues raised in the subject motion. A petition for review filed under this section shall:

(i) Identify the party seeking review;

(ii) Specify the issues upon which review of the initial determination is sought:

(A) A finding or conclusion of material fact is clearly erroneous;

(B) A legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

(C) The determination is one affecting Commission policy.

(iii) Set forth a concise statement of the facts material to the consideration of the stated issues; and

(iv) Present a concise argument setting forth the reasons why review by the Commission is necessary or appropriate to resolve an important issue of fact, law, or policy.

(2) Any issue not raised in the petition for review filed under this section will be deemed to have been abandoned and may be disregarded by the Commission in reviewing an initial determination.

(3) Any party may file a response to the petition for review within five (5) days after service of the petition, except that a party who has defaulted may not file a response to any issue regarding which party is in default.

(b) *Grant or denial of review.* (1) The Commission shall decide whether to grant, in whole or in part, a petition for review filed pursuant to § 210.53(a) within forty-five (45) days of the service of the initial determination on the parties, or by such other time as the Commissioner may order. The Commission shall decide whether to grant, in whole or in part, a petition for review filed pursuant to § 210.53(c) within thirty (30) days of the service of the initial determination on the parties, or by such other time as the Commission may order.

(2) The Commission shall decide whether to grant a petition for review, based upon the petition and response thereto, without oral argument or further written submissions unless the Commission shall order otherwise. The standards for granting review of an initial determination are set forth in paragraph (a)(1)(ii) of this section.

(3) The Commission shall grant a petition for review and order review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. In its notice, the Commission shall establish the scope of the review and the issues that will be considered and make provisions for filing of briefs and oral argument if deemed appropriate by the Commission. The notice that the Commission has granted the petition for review shall be served by the Secretary on all parties, the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as the Commission deems appropriate.

§ 210.55 Commission review on its own motion.

Within the time provided in § 210.53(h), the Commission on its own initiative may order review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. The standards for granting review of an initial determination are set forth in § 210.54(a)(1)(ii). This section does not apply to initial determinations issued pursuant to § 210.24(e)(17) or determinations issued by the presiding administrative law judge pursuant to § 210.24(e)(11).

§ 210.56 Review by Commission.

(a) *Briefs and oral argument.* In the event the Commission orders review of an initial determination, the parties may be requested to file review briefs concerning the issues on review at a time and of a size and nature set forth in the notice of review. The parties, within the time provided for filing the review briefs, may submit a written request for a hearing to present oral argument before the Commission, which the Commission in its discretion may grant or deny. The Commission shall grant the request when at least one of the participating Commissioners votes in favor of the request.

(b) *Scope of review.* Only the issues set forth in the notice of review, and all subsidiary issues therein, will be considered by the Commission.

(c) *Determination on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge and make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

(d) *Initial determinations concerning temporary relief.* Commission action on an initial determination concerning temporary relief is governed by the provisions of § 210.24(e) (17) and (18).

§ 210.57 Implementation of Commission action.

(a) *Service of Commission determination upon the parties.* A Commission determination pursuant to § 210.56(c) or a termination on the basis of a licensing or other agreement or consent settlement pursuant to § 210.51 (b) and (c), respectively, shall be served upon each party to the investigation.

(b) *Publication and transmittal to the President.* A Commission determination that there is a violation of section 337, or that there is reason to believe that there is such a violation, together with the action taken relative to such determination, or Commission action pursuant to Subparts B and C of Part 211 of this chapter shall be immediately published in the **Federal Register** and transmitted to the President, together with the record upon which it is based.

(c) *Enforceability of Commission action.* Unless otherwise specified, any Commission action, other than an exclusion order or order directing seizure and forfeiture of articles imported in violation of an outstanding exclusion order shall be enforceable upon receipt by the affected party of notice of such action. Exclusion orders and seizure and forfeiture orders shall be enforceable upon receipt of notice thereof by the Secretary of the Treasury.

(d) *Finality of affirmative Commission action.* If the President does not disapprove for policy reasons such Commission action within a period of sixty (60) days beginning on the day after delivery of a copy of such Commission action to the President, or if the President notifies the Commission before the close of such period that he approves such Commission action, then such Commission action shall become final on the day after the close of such period, or the day on which the

President notifies the Commission of his approval, as the case may be.

(e) *Duration.* Final Commission action shall remain in effect as provided in Subpart C of Part 211 of this Chapter.

§ 210.58 Commission action, public interest factor, and bonding.

(a) During the course of each proceeding under this Part when an investigation has been instituted, the Commission shall—

(1) Consider what action (general or limited exclusion of articles from entry and/or a cease and desist order, or exclusion of articles from entry under bond and/or a temporary cease and desist order), if any, it should take, and, when appropriate, take such action;

(2) Consult with and seek advice and information from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate, concerning the subject matter of the complaint and the effect its actions (general or limited exclusion of articles from entry and/or a cease and desist order, or exclusion of articles from entry under bond and/or a temporary cease and desist order) under section 337 of the Tariff Act shall have upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers;

(3) Determine the amount of the bond to be posted pursuant to paragraph (3) of subsection (j) of section 337 of the Tariff Act taking into account, among other things, the amount that would offset any competitive advantage resulting from the alleged unfair methods of competition and unfair acts enjoyed by persons benefitting from the importation of the articles in question.

(4) Receive submissions from the parties, other interested persons, Government agencies and departments, and the public with respect to the subject matter of paragraphs (a) (1), (2), and (3), of this section, which submissions shall be served upon the parties and be available to the public in the Office of the Secretary. The Commission will consider motions for oral argument or, when necessary, for a hearing with respect to the subject matter of this section, except with respect to the grant or denial of temporary relief on a motion filed pursuant to § 210.24(e).

(b) Unless otherwise ordered by the Commission or permitted by this paragraph, and except as provided in § 210.24(e) (12) and (13), the administrative law judge shall not take evidence or other information or hear arguments from the parties and other interested persons with respect to the subject matter of paragraphs (a) (1), (2), (3), and (4) of this section. However, with regard to settlements by agreement or consent order under §210.51 (b) and (c), the parties may file statements regarding the impact of the proposed settlement on the public interest, and the administrative law judge may in his discretion hear argument, although no discovery may be compelled with respect to issues relating solely to the public interest. Thereafter, the administrative law judge shall consider and make appropriate findings in the initial determination regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. With respect to raising the issues of appropriate Commission action, the public interest, and bonding for purposes of an initial determination concerning the grant or denial of a motion for temporary relief, see § 210.24(e) (12), (13), and (17).

§ 210.59 Period for concluding Commission investigation.

(a) Each investigation instituted under this Part shall be concluded and a final order issued no later than twelve (12) months after the date of publication in the **Federal Register** of the notice instituting the investigation, except that the Commission may designate the investigation as a "more complicated" investigation and require that it be concluded no later than eighteen (18) months after the date of publication in the **Federal Register** of the notice of investigation. A "more complicated" investigation refers to an investigation that is of an involved nature owing to the subject matter, difficulty in obtaining information, the large number of parties involved, or other significant factors. The Commission shall publish its reasons for designating the investigation as a "more complicated" ivnestigation in the **Federal Register**. In computing the 12-month and 18-month periods prescribed by this paragraph, there shall be excluded any period of time during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(b) An investigation may be designated "more complicated" by the Commission or the presiding administrative law judge pursuant to § 210.24(e)(11) for the purpose of extending the statutory deadline for determining whether to grant or deny a motion for temporary relief. The Commission's or the administrative law judge's reasons for designating the investigation "more complicated" for that purpose shall be published in the **Federal Register**. In computing the statutory deadline for determining whether to grant or deny a motion for temporary relief in an investigation designated "more complicated" pursuant to this paragraph (and § 210.24(e)(11)), there shall be excluded any period of time during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(c) Notwithstanding any provision of paragraph (a) of this section, the Commission may extend, by not more than ninety (90) days, the 12-month or 18-month period within which the Commission is required to make a final determination in an investigation if the Commission would be required to make such determination before the 180th day after the date of enactment of the Omnibus Trade and Competitiveness Act of 1988 and the Commission finds that the investigation is "complicated." A "complicated" investigation is one in which the following circumstances exist:

(1) Previously established deadlines or procedures must be changed in order to comply with provisions of the Omnibus Trade and Competitiveness Act of 1988 which amend section 337 of the Tariff Act; and

(2) The altered deadlines or procedures are impracticable, prejudice the rights of the parties, adversely affect the public interest, or create the possibility that the Commission will be unable to conclude the investigation by the prescribed 12-month or 18-month statutory deadline.

Unless otherwise ordered by the Commission, in order to obtain and implement the "complicated" designation and resulting extension of time, the parties, the administrative law judge, and the Commission shall follow the procedures used to obtain and implement a "more complicated" designation. (See §§ 210.53(c)–(i), 210.54, 210.55, 210.56 (a) through (c), and 210.57(a)). The Commission shall publish its reasons for designating an investigation "complicated" in the **Federal Register**. In computing the new termination deadline resulting from such designation, there shall be excluded any period of time during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

Subpart G—Appeals

§ 210.60 Petition for reconsideration.

Within fourteen (14) days after service of a Commission determination, any party may file with the Commission a petition for reconsideration of such determination or any action ordered to be taken thereunder, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the determination or action ordered to be taken thereunder and upon which the petitioner had no opportunity to submit arguments. Any party desiring to oppose such a petition shall file an answer thereto within five (5) days after service of the petition upon such party. The filing of a petition for reconsideration shall not stay the effective date of the determination or action ordered to be taken thereunder or toll the running of any statutory time period affecting such determination or action ordered to be taken thereunder unless specifically so ordered by the Commission.

§ 210.61 Disposition of Petition for reconsideration.

The Commission may affirm, set aside, or modify its determination, including any action ordered by it to be taken thereunder. When appropriate, the Commission may order the administrative law judge to take additional evidence.

§ 210.70 Interlocutory appeals.

Rulings by the administrative law judge on motions may not be appealed to the Commission prior to the administrative law judge's issuance of his initial determination, except in the following circumstances:

(a) *Appeals without leave of the administrative law judge.* The Commission may in its discretion entertain interlocutory appeals, except as provided in § 210.24(e)(15), when a ruling of the administrative law judge:

(1) Requires the disclosure of the Commission records or requires the appearance of Government officials pursuant to § 210.35(c); or

(2) Denies an application for intervention pursuant to the provisions of § 210.26. Appeals from such ruling may be sought by filing an application for review, not to exceed fifteen (15) pages with the Commission within five (5) days after notice of the administrative law judge's ruling. An answer to the application for review may be filed within five (5) days after service of the application. The application for review should specify the person or party taking the appeal, designate the ruling or part thereof from which appeal is being taken, and specify the reasons and present arguments as to why review is being sought. The Commission may, upon its own motion, enter an order staying the return date of an order issued by the administrative law judge pursuant to § 210.35(c) or an order placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues that will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals with leave of the administrative law judge.* Except as otherwise provided in paragraph (a) of this section and § 210.24(e)(15), applications for review of a ruling by an administrative law judge may be allowed only upon request made to the administrative law judge and upon determination by the administrative law judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, and that either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy. Applications for review in writing, not to exceed fifteen (15) pages, may be filed within five (5) days after notice of the administrative law judge's determination. An answer to the application for review may be filed within five (5) days after service of the application for review. Thereupon, the Commission may, in its discretion, permit an appeal. Commission review, if permitted, shall be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered from the Commission.

(c) *Investigation not stayed.* Application for review under this section shall not stay the investigation before the administrative law judge unless the administrative law judge or the Commission shall so order.

§ 210.71 Appeals of final determination to the United States Court of Appeals for the Federal Circuit.

Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f) or (g) of section 337 of the Tariff Act may appeal such determination to the United States Court of Appeals for the Federal Circuit.

2. Part 211 is revised to read as follows:

PART 211—ENFORCEMENT PROCEDURES

Sec.
211.01 Purpose.

Subpart A—Informal Enforcement Procedure

211.10 Informal disposition through voluntary compliance.

Subpart B—Consent Order Procedure

Sec.
211.20 Opportunity to submit proposed consent order.
211.21 Settlement by consent.
211.22 Contents of consent order agreement.

Subpart C—Enforcement, Modification, and Revocation of Final Commission Actions

211.50 Applicability, purpose, and retroactivity.
211.51 Information gathering.
211.52 Confidentiality of information.
211.53 Review of reports.
211.54 Advice concerning Commission orders.
211.55 Modification of information requirements.
211.56 Proceedings to enforce Commission orders.
211.57 Modification or rescission of final Commission actions.
211.58 Temporary emergency action.
211.59 Notice of enforcement action to Government agencies.

Authority: 19 U.S.C. 1333, 1335, and 1337.

§ 211.01 Purpose.

This part sets forth procedures for the settlement by consent of matters that involve alleged violations of section 337 of the Tariff Act of 1930 and for the enforcement, modification, and revocation of final Commission actions. Definitions applicable to Part 210 apply to this part unless specifically provided otherwise.

Subpart A—Informal Enforcement Procedure

§ 211.10 Informal disposition through voluntary compliance.

(a) Opportunity for informal disposition. When the Commission has information obtained during the course of an informal inquiry or preliminary investigation pursuant to section 603 of the Trade Act of 1974 (19 U.S.C. 2482) indicating that a person may be engaging in a practice that may involve a violation of section 337 of the Tariff Act of 1930, it may afford such person the opportunity to have the matter disposed of on an informal administrative basis if it deems that the public-interest factors set forth in

§ 210.58(a)(2) of this chapter will be fully safeguarded thereby.

(b) Public-interest factors to be considered. In determining whether the public-interest factors set forth in § 210.58(a)(2) of this chapter will be fully safeguarded through such informal administrative action, the Commission will consider:

(1) The nature and gravity of the practice;

(2) Whether the practice is likely to recur;

(3) The prior record and good faith of the person involved;

(4) The adequacy of assurance of voluntary compliance; and

(5) Any other relevant factor that the Commission deems appropriate.

Subpart B—Consent Order Procedure

§ 211.20 Opportunity to submit proposed consent order.

(a) Prior to institution of an investigation. Where time, the nature of the proceeding, and the public interest permit, any person being investigated pursuant to section 603 of the Trade Act of 1974 (19 U.S.C. 2482) or § 210.11(b) shall be afforded the opportunity to submit to the Commission a proposal for disposition of the matter under investigation in the form of a consent order agreement that incorporates a proposed consent order executed by or on behalf of such person and that complies with the requirements of § 211.22.

(b) Subsequent to institution of an investigation. In investigations under section 337 of the Tariff Act of 1930, a proposal to settle a matter by consent shall be submitted as a motion to the presiding officer to terminate an investigation under § 210.51 of this chapter together with a consent order agreement that incorporates a proposed consent order. If the consent order agreement contains confidential business information within the meaning of § 201.6 of this chapter, a copy of the agreement with such information deleted shall accompany the motion. The proposed agreement shall comply with the requirements of § 211.22. At any time prior to commencement of a hearing as provided in § 210.41(a)(1) of this chapter, the motion may be filed jointly by all of the following:

(1) All private complainants;

(2) The Commission investigative attorney; and

(3) One or more respondents.

However, upon request and for good cause shown, the presiding officer may consider such a motion during or after a hearing. The filing of the motion shall not stay proceedings before the presiding officer unless the presiding officer so orders. The presiding officer shall promptly file with the Commission an initial determination regarding the motion for termination. If the initial determination contains confidential business information, a copy of the initial determination with such information deleted shall be filed with the Commission simultaneously with the filing of the confidential version of the initial determination. The Commission shall promptly publish a notice in the **Federal Register** stating that an initial determination has been received terminating the respondent or the respondents in question on the basis of a consent order agreement, that nonconfidential versions of the initial determination and consent order agreement are available for inspection in the Office of the Secretary, and that interested persons may submit written comments concerning termination of the respondents in question within ten (10) days of the date of publication of the notice in the **Federal Register**. Pending disposition by the Commission of a consent order agreement, a party may not, absent good cause shown, withdraw from the agreement once it has been submitted pursuant to this section.

§ 211.21 Settlement by consent.

(a) After the initial determination on the motion for termination based on a consent order agreement has been filed with the Commission, the Commission shall promptly serve copies of the nonconfidential version of the initial determination and the proposed consent order agreement on the Department of Health and Human Services, the Department of Justice, and the Federal Trade Commission, and such other departments and agencies as the Commission deems appropriate.

(b) The Commission, after considering the effect of the consent order upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers in the manner provided by § 210.58(a) of this chapter, shall dispose of the initial determination according to the procedures of §§ 210.53 through 210.56 of this chapter. In accordance with subsection (c) of section 337 of the Tariff Act of 1930, an order of termination based upon a consent order agreement need not constitute a determination as to violation of section 337.

§ 211.22 Contents of consent order agreement.

(a) Contents. Every consent order agreement shall contain, in addition to the appropriate proposed consent order, the following:

(1) An admission of all jurisdictional facts;

(2) An express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order; and

(3) A statement that the enforcement, modification, and revocation will be carried out pursuant to Subpart C of Part 211, incorporating by reference the Commission's Rules of Practice and Procedure.

The consent order agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute admission by any party that section 337 of the Tariff Act of 1930 has been violated.

(b) Effect, interpretation, and reporting. The consent order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and Parts 210 and 211 for other Commission action. Except as otherwise provided in the agreement, the complaint and notice of investigation or the proposed complaint may be used in construing the terms of the consent order, but no agreement, understanding, representation or interpretation not contained in the consent order agreement or Commission decision accompanying the consent order may be used to vary the terms of the consent order. The Commission may require periodic compliance reports pursuant to Subpart C of Part 211 to be submitted by the person entering into the consent order agreement.

Subpart C—Enforcement, Modification, and Revocation of Final Commission Actions

§ 211.50 Applicability, purpose, and retroactivity.

(a) Applicability. The rules in this subpart apply to final Commission actions issued by the Commission under section 337 of the Tariff Act of 1930, including exclusion orders, cease and desist orders, and consent orders.

(b) Purpose. The purpose of this subpart is to set forth procedures for the enforcement, modification, and revocation of final Commission actions.

(c) Retroactivity. The rules in this subpart apply to final Commission actions taken before the effective date

of these rules only to an extent not inconsistent with such final actions.

§ 211.51 Information gathering.

(a) Power to require information. Whenever the Commission takes a final Commission action, it may require any person to report facts available to that person that will aid the Commission in determining whether and to what extent there is compliance with the action or whether and to what extent the conditions that led to the action are changed. The Commission may also include provisions that exercise any other information gathering power available to it by law. The Commission may at any time request the cooperation of any person or agency in supplying it with information that will aid it in these determinations.

(b) Form and detail of reports. Reports under paragraph (a) of this section are to be in writing, under oath, and in such detail and in such form as the Commission prescribes. A final Commission action may also contain terms and conditions that exercise, or make possible the exercise of, on conditions precedent, any power of information gathering available to the Commission by law, subject to the standards of paragraph (a) of this section.

(c) Power to enforce informational requirements. Terms and conditions of final Commission actions for reporting and information gathering, and modifications of such terms and conditions, shall be enforceable by the Commission by a civil action under 19 U.S.C. 1333 or, at the Commission's discretion, in the same manner as any other provision of the final Commission action is enforceable.

(d) Term of reporting requirement. The Commission may prescribe in the final Commission action (or, in the case of a consent order, approve) the frequency of reporting or information gathering and the date on which these activities are to terminate. If no date for termination is provided, reporting and information gathering shall terminate when the final Commission action or any amendment to it expires by its own terms or is terminated. The Commission may modify informational requirements of a final Commission action at any time pursuant to §§ 211.53 and 211.55.

§ 211.52 Confidentiality of information.

Confidential information (as defined in § 201.6(a) of this Chapter) that is provided to the Commission pursuant to final Commission action will be received by the Commission in confidence. The restrictions on disclosure and the procedures for handling such information (which are set out in §§ 210.6 and 210.44 of this chapter) shall apply and, in a proceeding under § 211.56 or § 211.57, the Commission or the presiding administrative law judge may, upon motion or *sua sponte,* issue or continue appropriate protective orders.

§ 211.53 Review of reports.

(a) Review to insure compliance. The Commission, through its Office of Unfair Import Investigations, will review reports submitted pursuant to any final Commission action and conduct such further investigation as it deems necessary to insure compliance with its orders and to ascertain if such orders are being violated.

(b) Extension of time. The Director of the Office of Unfair Import Investigations may, for good cause shown, extend the time for filing reports required by Commission orders. An extension of time within which a report may be filed, or the filing of a report that does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from its obligation under the law with respect to compliance with such order.

§ 211.54 Advice concerning Commission orders.

(a) Advice to respondents submitting information. The Commission may advise respondents reporting or providing information whether their reports or information comply with a final Commission order or whether the actions or information set forth therein evidence compliance with the Commission order. The Commission may, in any event, institute proceedings pursuant to § 211.56 to enforce compliance with an order.

(b) Advisory opinions. Upon request of a respondent, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether a respondent's proposed new course of action or conduct would violate the Commission order or section 337 of the Tariff Act of 1930. The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337, would be in the public interest, and would benefit consumers and competitve conditions in the United States.

(c) Revocation. The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind as well as an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action that was taken in good faith reliance upon the Commission's approval or advice under this section, if all relevant facts were fully, completely, and accurately presented to the Commission and such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

§ 211.55 Modification of information requirements.

(a) Cease and desist orders. The Commission may modify reporting requirements of cease and desist orders as necessary to assure compliance with an outstanding action, to take account of changed circumstances, or to minimize the burden of reporting or informational access. An order to modify reporting requirements shall identify the reports involved and state the reason or reasons for modification. No reporting requirement will be suspended during the pendency of such a modification unless the Commission so orders. The Commission may, if the public interest warrants, announce that a modification of reporting is under consideration and ask for comment, but it may also modify any reporting requirement at any time without notice, consistent with the standards of this section.

(b) Consent orders. Consistent with the standards set forth in paragraph (a) of this section, the Commission may modify reporting requirements of consent orders. The Commission shall publish a notice of any proposed change in the **Federal Register,** together with the reporting requirements to be modified and the reasons therefor, and serve notice on each party subject to the proposed modified consent order. Such parties shall be given the opportunity to sumit briefs to the Commission, and the Commission may hold a hearing on the matter.

§ 211.56 Proceedings to enforce Commission orders.

(a) Informal enforcement proceedings. Informal enforcement proceedings may be conducted by the Commission, through its Office of Unfair Import Investigations, with respect to any act or omission by any person in violation of any provision of a final Commission action. Such matters may be handled by the Commission through correspondence or conference or in any other way that the Commission deems appropriate. The Commission may issue such orders as it deems appropriate to implement and

insure compliance with the terms of a cease and desist or exclusion order, or any part thereof. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this Subpart.

(b) Court enforcement. To enforce a Commission order, the Commission may, without prior notice of any kind to a respondent or any proceeding otherwise available under the section, initiate a civil action in a U.S. district court pursuant to subsection (f) of section 337 of the Tariff Act of 1930, requesting the imposition of such civil penalty or the issuance of such mandatory injunctions as the Commission deems necessary to enforce its orders and protect the public interest.

(c) Formal Commission enforcement proceedings. The Commission may institute an enforcement proceeding at the Commission level by docketing a complaint setting forth alleged violations of any final Commission order. The complaint, if docketed, shall be served upon the alleged violator, and notice of the complaint and the institution of formal enforcement proceedings shall be published in the **Federal Register.** Within fifteen (15) days after the date of receipt of such complaint, the named respondent shall file a response. Responses shall fully advise the Commission as to the nature of any defense and shall admit or deny each allegation of the complaint specifically and in detail unless the respondent is without knowledge, in which case its answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed uncontroverted.

(1) Failure of a respondent to file and serve a response within the time and in the manner prescribed herein shall authorize the Commission, in its discretion, to find the facts alleged in the complaint to be true and to take such action as may be appropriate without notice or hearing, or, in its discretion, to proceed without notice to take evidence on the allegations or charges set forth in the complaint, provided that the Commission or the presiding officer (if one is appointed) may permit late filing of an answer for good cause shown.

(2) The Commission, in the course of a formal enforcement proceeding under paragraph (c) of this section, may hold a public hearing and afford the parties to the enforcement proceeding the opportunity to appear and be heard. The hearing provided for under paragraph (c) of this section is not subject to sections 554, 556, 557, and 702 of title 5, United States Code. The Commission may delegate any hearing under paragraph (c) of this section to the Chief Administrative Law Judge for designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

(3) Upon conclusion of an enforcement proceeding under paragraph (c) of this section, the Commission may modify a cease and desist, consent, or exclusion order in any manner necessary to prevent the unfair practices that were originally the basis for issuing such order, bring civil actions in a United States district court pursuant to § 211.56(b) (and subsection (f) of section 337 of the Tariff Act of 1930) requesting the imposition of a civil penalty or the issuance of mandatory injunctions incorporating the relief sought by the Commission, or revoke the cease and desist order or consent order and direct that the articles concerned be excluded from entry into the United States.

(4) Prior to effecting any modification, or revocation, and/or exclusion, under paragraph (c) of this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

(5) In lieu of or in addition to taking the action provided for in paragraph (a)(3) of this section, the Commission may issue, pursuant to subsection (i) of section 337 of the Tariff Act of 1930, an order providing that any article imported in violation of the provisions of section 337 of the Tariff Act and an outstanding final exclusion order issued pursuant to subsection (d) of section 337 be seized and forfeited to the United States, if the following conditions are satisfied:

(i) The owner, importer, or consignee of the article (or the agent of such person) previously attempted to import the article into the United States;

(ii) The article previously was denied entry into the United States by reason of a final exclusion order; and

(iii) Upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article (or the agent of such person) with written notice of the aforesaid exclusion order and the fact that seizure and forfeiture would result from any further attempt to import the article into the United States.

§ 211.57 Modification or rescission of final Commission actions.

(a) Petitions for modification or rescission of final Commission actions. (1) Whenever any person believes that conditions of fact or law, or the public interest, require that a final Commission action be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action. The petition shall state the changes desired and the changed circumstances warranting such action, and shall include materials and argument in support thereof.

(2) If the petitioner previously has been found by the Commission to be in violation of section 337 of the Tariff Act of 1930 and if his petition requests a Commission determination that the petitioner is no longer in violation of that section or requests modification or rescission of an order issued pursuant to subsections (d), (e), (f), (g), or (i) of section 337, the burden of proof in any proceeding initiated in response to the petition pursuant to paragraph (b) of this section shall be on the petitioner. In accordance with subsection (k) of section 337, relief may be granted by the Commission with respect to such petition on the basis of new evidence or evidence that could not have been presented at the prior proceeding, or on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

(b) Commission action upon receipt of petition. Upon receiving a petition, the Commission shall either provisionally accept the petition or reject it. The Commission shall treat a self-initiated action as a provisionally accepted petition under this section. Upon provisional acceptance, notice thereof shall be published in the **Federal Register**, and the petition and the notice shall be served on each former party to the original investigation under section 337 of the Tariff Act of 1930. Within thirty (30) days after the service of such petition, any party served may file an answer. The Commission may hold a public hearing and afford interested persons the opportunity to appear and be heard. After consideration of the petition, any responses thereto, or any information placed on the record at a public hearing or otherwise, the Commission shall take such action as it deems appropriate. Any final Commission action will, if not modified or revoked, expire by terms stated in the action. The Commission may delegate any hearing under this section to the Chief Administrative Law Judge for

designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

§ 211.58 Temporary emergency action.

(a) Whenever the Commission determines, pending a formal enforcement proceeding under § 211.56(b), that without immediate action a violation of a Commission order will occur and that subsequent action by the Commission would not adequately repair substantial harm caused by such violation, the Commission may immediately and without hearing or notice modify or revoke such order and, if it is revoked, replace the order with an appropriate exclusion order.

(b) If the Commission determines, pending a formal enforcement proceeding under § 211.56(b), that without immediate action a violation of a final exclusion order will occur and that subsequent action by the Commission would not adequately repair substantial harm caused by such violation, the Commission may immediately and without hearing or notice issue an order requiring temporary seizure and forfeiture of the imported articles in question, provided the following requirements are satisfied:

(1) The owner, importer, or consignee of the article (or the agent of such a person) previously attempted to import the article into the United States;

(2) The article was previously denied entry into the United States by reason of a final exclusion order; and

(3) Upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article (or the agent of such person) with written notice of the aforesaid exclusion order and the fact that seizure and forfeiture would result from any further attempt to import the article into the United States.

(c) Prior to taking any action under this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Commission shall, if it has not already done so, institute a formal enforcement proceeding under § 211.56 at the time of taking action under this section or as soon as possible thereafter, in order to give the alleged violator and other interested parties a full opportunity to present information and views regarding the continuation, modification, or revocation of Commission action taken under this section.

§ 211.59 Notice of enforcement action to Government agencies.

(a) Consultation. The Commission may consult with or seek information from any Government agency while taking action under this subpart.

(b) Notification of Treasury. The Commission shall notify the Secretary of the Treasury of any action under this subpart that results in a permanent or temporary exclusion of articles from entry, or the revocation of an order to such effect, or the issuance of an order compelling seizure and forfeiture of imported articles.

By order of the Commission.

Kenneth R. Mason,

Secretary.

Issued: August 24, 1988.

[FR Doc. 88-19638 Filed 8-26-88; 8:45 am]

BILLING CODE 7020-02-M

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federal register

Monday
August 29, 1988

Part X

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 531

Passenger Automobile Average Fuel Economy Standards for Model Years 1989 and 1990; Proposed Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 531

[Docket No. FE-88-01; Notice 2]

[RIN No. 2127-AB75]

Passenger Automobile Average Fuel Economy Standards for Model Years 1989 and 1990

AGENCY: National Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); notice of public meeting; response to petitions.

SUMMARY: The National Highway Traffic Safety Administration is seeking public comment on whether to reduce the passenger car corporate average fuel economy standards for Model Year 1989, 1990, or both. NHTSA is taking this action to determine whether retaining the 27.5 mpg standard (which is set by statute) would have a significant, adverse effect on U.S. employment or on the competitiveness of the U.S. auto industry. Until recently, the Department had no evidence to support the motion that the 1989 or 1990 standard might have such significant effects. Within the past few weeks, however, NHTSA has received information suggesting that the MY 1989 and 1990 standard could threaten the competitiveness of the U.S. auto industry. In addition, the Department seeks comment on whether the Department will be able to find again that a substantial share of the market made reasonable efforts to achieve the statutory standard. Accordingly, NHTSA is proposing to set the standard at a level between 26.5 and 27.5 mpg.

DATES: *Written Comments:* The agency is providing different comment periods for the proposed MY 1989 and MY 1990 standards. Written comments on the proposed MY 1989 standard must be received on or before September 15, 1988. Written comments on the proposed MY 1990 standard must be submitted by October 28, 1988. An explanation of the abbreviated comment period for the proposed MY 1989 standard is provided in the Supplementary Information section of this notice.

Public Meeting: A public meeting to receive oral comments on the proposed standards for both model years will be held on September 14, 1988, at 9 a.m., at the Department of Commerce Auditorium, 14th Street and Constitution Ave. NW., in Washington, DC.

Effective Date: The proposed amendments would be effective for MYs 1989–90.

ADDRESSES: *Written Comments:* Each written comment on these proposals must refer to the docket and notice numbers set out in brackets underneath "49 CFR Part 531" in the heading of this document and must be submitted (preferably 10 copies) to the Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street SW., Washington, DC 20590. Submissions containing information for which confidential treatment is requested should be submitted (3 copies) to the Chief Counsel, National Highway Traffic Safety Administration, Room 5219, 400 Seventh Street SW., Washington, DC 20590, and 7 additional copies from which the purportedly confidential information has been deleted should be sent to the Docket Section, at the address given above.

Public Meeting: The September 14, 1988 public hearing will be held at the U.S. Dep't of Commerce Auditorium, Herbert C. Hoover Building, 14th Street and Constitution Ave. N.W., Washignton, DC. (The entrance to the auditorium is on 14th Street.)

FOR FURTHER INFORMATION CONTACT: *Questions regarding the public meeting:* Mr. James Jones, Office of Market Incentives, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. (202–366–4793). *All other questions:* Mr. Orron Kee, Office of Market Incentives, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. (202) 366–0846.

SUPPLEMENTARY INFORMATION:

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I. Introduction

For several years, the Secretary of Transportation has been calling public attention to the serious economic dislocations threatened by the law establishing the Corporate Average Fuel Economy (CAFE) program. Among other things, the Department has found, in previous years, that industry actions needed to comply with the statutory standard of 27.5 mpg seriously threatened American jobs. Indeed, the Department found specifically that tens of thousands of U.S. jobs could have been lost, had the fuel economy standard been retrained at 27.5 mpg. Accordingly the Department reduced the standards for Model Years 1986 through 1988, finding that the potential for significant economic harm from the higher standard outweighed the negligible energy savings that could (theoretically) be realized from the higher standard.

One of the most perverse aspects of the CAFE law is its positive incentive to ship U.S. jobs out of this country. The law requires that manufacturers separate their fleets into two categories: a "domestic" fleet and a "not domestically manufactured" (or, import) fleet. In fact, the rules defining "domestically manufactured" are so strict that many cars assembled in the U.S. (including all U.S.-built Japanese models) do not qualify as "domestically manufactured." The law further requires that the CAFE standard be met separately by a manufacturer's "domestic" fleet and its "import" fleet. For U.S. manufacturers, each of which has two fleets under this rule, the two fleets cannot be averaged together for compliance purposes. In contrast, the Japanese companies average their small cars with their largest cars, because they don't have any cars that meet the strict "domestic" content rules. This provision hurts only the U.S. auto makers and U.S. autoworkers—because it encourages the export of U.S. jobs for the sole purpose of affecting the assignment of a model to "import" rather than the "domestic", fleet. Obviously, this result would have *no* impact on the fuel efficiency of the model, but would have significant adverse effects on the employment status of the U.S. autoworkers employed to construct that car model or its parts. In previous fuel economy rulemaking proceedings, the Department found that the 27.5 mpg standard posed a significant threat to U.S. jobs by encouraging manufacturers to ship jobs out of the country solely for CAFE compliance.

In these previous rulemaking decisions, the agency also found that the auto manufacturers had made reasonable plans to achieve the statutory standard, but that these plans had been derailed for reasons outside the control of the manufacturers. Based on new information suggesting that economic dislocations could occur if the statutory standard of 27.5 mpg is retained for MY 1989 and 1990, the agency has opened this proceeding to ascertain the magnitude of the threatened economic dislocations and the reasons for them. The Department is particularly concerned about whether the statutory standard significantly threatens U.S. jobs or the competitiveness of the U.S. auto industry. Finally, the Department is seeking comment on whether the Department will be able to find again that a substantial share of the market made reasonable efforts to achieve the statutory standard.

If the Department decides to amend the standard, the amendment must be set at the "maximum feasible average fuel economy level." Section 502(e) of the Act requires the agency to consider four factors in determining that level: technological feasibility, economic practicability, the effect of other Federal standards on fuel economy, and the need of the nation to conserve energy. Another focus of this proposal is a request for information and comments concerning the maximum feasible CAFE level.

II. Background

A. Corporate Average Fuel Economy Statutory Provisions

In December 1975, during the aftermath of the energy crisis created by the oil embargo of 1973–74, Congress enacted the Energy Policy and Conservation Act (EPCA). One provision of EPCA established an automotive fuel economy regulatory program and was added as a new Title V to the existing Motor Vehicle Information and Cost Savings Act (the Act, 15 U.S.C. 2001 *et seq.*). The program includes corporate average fuel economy (CAFE) standards for passenger automobiles.

Title V specified CAFE standards for passenger automobiles of 18, 19, and 20 mpg, for MYs 1978, 1979, and 1980, respectively. The Secretary of Transportation (as delegated to the NHTSA Administrator) was required to establish standards for MYs 1981–1984. For MY 1985 and thereafter, Title V specifies a standard of 27.5 mpg.

Under the Act, the agency has discretion, in certain circumstances, to amend the 27.5 mpg standard. Section 502(a)(4) provides that the standard for MY 1985 or any year thereafter may be amended to a level which the agency determines is the "maximum feasible average fuel economy level" for the model year in question. In determining maximum feasible, the agency is required by section 503(e) of the Act to consider the following four factors: (1) Technological feasibility; (2) economic practicability; (3) the effect of other Federal motor vehicle standards on fuel economy; and (4) the need of the Nation to conserve energy.

While compliance with fuel economy standards is determined by averaging the various models produced by each manufacturer, enabling them to produce vehicles with fuel economy below the level of the standard if they produce sufficient numbers of vehicles with fuel economy above the level of the standard, manufacturers may not average their imported cars together with their domestically manufactured cars. Instead, manufacturers must meet fuel economy standards separately for their imported and domestically manufactured fleets. (See section 503 of the Act.) Cars are considered to be domestically manufactured if they have at least 75 percent domestic content. Conversely, cars are considered to be imports, or as the statute characterizes them, "not domestically manufactured," if they have less than 75 percent domestic content. One result of this provision is that domestic automakers are unable to take advantage of the higher fuel economy of smaller imported vehicles which they sell, for purposes of CAFE compliance of their domestic fleets.

While a separate fuel economy standard is set for each model year, the Cost Savings Act does not require absolute achievement of the standard by manufacturers within each year. Instead, it allows a shortfall in one year (or years) to be offset if a manufacturer exceeds the standard for another year (or years). Under the Act, as amended by the Automobile Fuel Efficiency Act of 1980, manufacturers earn credits for exceeding average fuel economy standards which may be carried back for three model years or carried forward for three model years. If a manufacturer still does not meet the standard, after taking credits into account, it has committed "unlawful conduct" under section 508 of the Act, and is liable to the Federal government for civil penalties.

In recent years, the Department increasingly has become aware of—and concerned by—the discriminatory effects and adverse impacts of the CAFE program, and of its marginal relevance to *real* fuel economy. On August 5, 1987, the Secretary of Transportation submitted to Congress draft legislation that would repeal the corporate average fuel economy standards for new model years. The bill would also retain and update the Environmental Protection Agency's (EPA) fuel economy labeling requirements, and revise EPA's automotive fuel economy testing procedures to require that results simulate conditions of actual use. The legislation was proposed in light of a number of considerations, including the fact that the energy conservation goals that Congress sought to achieve by the CAFE program largely have been realized. Another is the growing view of economic thought that the decontrol of the price of oil and changes in gasoline prices, rather than CAFE standards, were primarily responsible for the increase in fuel efficiency over the past decade. The nation might well have achieved similar results simply through the natural operation of the market.

Moreover, it is clear that CAFE standards can cause serious economic distortions in the marketplace. For example, while the standards exert pressure on manufacturers to sell a mix of vehicles to meet the required CAFE level, they do nothing to ensure that consumers will want to buy the mix the manufacturers offer. Indeed, if standards are set at too high a level, the manufacturers may be able to meet the standards only by restricting the sale of their larger (domestically produced) vehicles and engines, resulting in the loss of American jobs and less choice for consumers. The law also provides perverse incentives for domestic carmakers to move parts and assembly jobs for larger cars out of the United States, just so those vehicles can be shifted from the "domestic" to the "imported" fleet. Also, CAFE standards place the full-line U.S. automakers at a competitive disadvantage, as compared to other producers who specialize in smaller vehicles. As a result, domestic manufacturers may be forced to restrict sales of their larger, less fuel efficient vehicles. Import manufacturers who are not constrained by the CAFE standards simultaneously are entering this market segment, which long has been dominated by domestic manufacturers. The Secretary noted that there is strong evidence that the market will continue to provide the proper balancing of fuel-efficient vehicles versus other vehicle characteristics such as size, safety, and performance, and concluded that the most sensible public policy is to repeal the CAFE standards program.

Unfortunately, the Congress has not yet taken any action on the Department's legislative proposal. Unless and until the draft legislation becomes law, NHTSA must continue to administer the law as it is currently written, and as it has been construed by the courts. Thus, today's notice is based on the existing law.

B. Setting the 1981–84 Standards

On June 30, 1977, NHTSA published in the **Federal Register** (42 FR 33534) a final rule establishing the MYs 1981–1984 passenger automobile CAFE standards. The selected standards were 22.0 mpg for 1981, 24.0 mpg for 1982, 26.0 mpg for MY 1983 and 27.0 mpg for MY 1984.

As part of establishing the 1981–1984 standards, the agency developed estimates of the maximum feasible fuel economy for each manufacturer for MYs 1981 through 1985. The agency's conclusion at that time was that "levels of average fuel economy in excess of 27.5 mpg are achievable in the 1985 time frame." 42 FR 33552 The agency believed that it was feasible for GM to achieve an average fuel economy level of 28.9 mpg in MY 1985, Ford 27.9 mpg and Chrysler 28.7 mpg. See 1977 Rulemaking Support Paper (RSP), p. 5–38 (Table 5.11). Those levels were based on a number of assumptions, including the ability of manufacturers to maintian a rapid rate of introduction of technology, consumer acceptance of a 10 percent reduction in vehicle acceleration, and significant use of a widespread range of technological options, including weight reduction, improved transmissions and lubricants, reduced aerodynamic drag, reduced accessory losses and reduced tire rolling resistance.

The agency's estimates did not assume a downward mix shift in automobile sizes or the use of diesel engines. The agency concluded that a standard set at a level that required substantial mix shifts would not be economically practicable due to the risk that a signficant number of consumers might defer purchasing new automobiles, resulting in a substantial sales drop. However, these techniques were viewed in the 1977 rule as "constituting a safety margin" for manufacturers in the event that other technological improvements did not result in sufficient CAFE improvements. 42 FR 33545, June 30, 1977.

As to foreign manufacturers, the 1977 RSP projected that all but three of them could improve their average fuel economy levels, without expanded use of diesel engines, sufficiently to meet the 27.5 mpg standard. With fleet fuel economy improvements from additional diesels included in the foreign fleet projections, only one manufacturer, Mercedes, was projected to fall below the 1985 standard.

It should be emphasized that the agency's 1977 estimates were intended to demonstrate the feasibility of achieving the 27.5 mpg standards and not to predict what specific actions the manufacturers would actually take to achieve the standard. The agency's estimates were based on one scenario of what the agency believed manufacturers could do to achieve an average fuel economy level of 27.5 mpg by 1985. Manufacturers were free to pursue other courses of action to achieve the 27.5 mpg fuel economy level.

C. Events from 1977 to 1984

In January 1979, NHTSA presented new feasibility estimates for each manufacturer for MYs 1980 through 1985 in its Third Annual Report to the Congress on the Automotive Fuel Economy Program (44 FR 5742, January 29, 1979). The agency stated that "(o)n balance, the conclusions reached during the 1981–84 rulemaking * * * are similar to those resulting from the most recent assessments. These assessments indicate that all domestic manufacturers can exceed the scheduled standards for each year through 1985." 44 FR 5757.

Between January and May of 1979, NHTSA received a number of submissions from Ford and General Motors on the 1981–1984 fuel economy standards for passenger automobiles asserting that those standards should be reduced. In response to these submissions, the agency published a document entitled "Report on Requests by General Motors and Ford to Reduce Fuel Economy Standards for MY 1981–85 Passenger Automobiles," DOT HS–804 731, June 1979. The report concluded that the standards were technologically feasible and economically practicable and noted that both companies had submitted product plans for meeting the standards. Report, p. 14.

One year later, the Nation was in the midst of another energy crisis, brought on by events in Iran. Gasoline prices were rising rapidly, creating significantly increased consumer demand for small cars. The U.S. city average retail price for gasline rose from 88 cents per gallon in 1979 to $1.22 in 1980. (In 1986 dollars, this increase was from $1.33 in 1979 to $1.63 in 1980.) In light of these changed conditions, the industry announced plans to significantly exceed the 27.5 mpg standard for 1985. Both Ford and GM, as well as Chrysler and American Motors (now a part of Chrysler), indicated that they expected to achieve average fuel economy in excess of 30 mpg for that model year. Product plans submitted to NHTSA by those companies indicated that the projections assumed significant mix shift toward smaller cars and rapid introduction of new technology.

On January 26, 1981, NHTSA published an advance notice of proposed rulemaking (ANPRM) in the **Federal Register** (46 FR 8056) which addressed the issue of passenger automobile fuel economy standards for MY 1985 and beyond. That notice and an accompanying paper entitled "Analysis of Post-1985 Fuel Economy," assumed that manufacturers would achieve their announced average fuel economy goals of over 30 mpg for 1985.

On April 16, 1981, NHTSA published in the **Federal Register** (46 FR 22243) a notice withdrawing the ANPRM. The notice stated that "(t)his action is being taken in recognition of market pressures which are creating strong consumer demand for fuel-efficient vehicles and sending clear signals to the vehicle manufacturers to produce such vehicles. It is expected that the market will continue to act as a powerful catalyst * * *."

Conditions affecting fuel economy changed dramatically after 1981, following completion of decontrol of domestic oil and other external factors increasing available supplies. Gasoline prices did not continue to rise but instead declined over time. This, combined with economic recovery, caused consumer demand to shift back toward larger cars and larger engines. Data submitted to the agency by GM and Ford in mid-1983 indicated that instead of achieving fuel economy well in excess of the 27.5 mpg standard for MY 1985, they would be unable to meet the levels prescribed by the standard.

D. Rulemakings to Amend the MYs 1986–1988 CAFE Standards

In response to petitions from GM and Ford, the agency exercised its discretion and lowered the MY 1986 and MY 1987–88 passenger automobile CAFE standards in two separate rulemakings. (For MY 1986, see 50 FR 40528, October 4, 1985; for MYs 1987–88, see 51 FR 35594, October 6, 1986.) (The agency denied petitions by Mercedes-Benz and GM to amend retroactively the MYs 1984–85 passenger automobile CAFE standards. (See 53 FR 15241, April 28, 1988.))

The rulemaking reducing the MYs 1986–1988 CAFE standards were consistent with the Cost Savings Act and its legislative history which clearly indicate that NHTSA has the authority to reduce fuel economy standards. The determination of maximum feasible average fuel economy level is made as of the time of the amendment. The agency has emphasized, however, that it could not reduce properly a standard under the Act if a current inability to meet the standard resulted from manufacturers previously declining to take reasonable steps to improve their average fuel economy as required by the Act.

For MY 1986, the agency evaluated the manufacturers' past efforts to achieve higher levels of fuel economy as well as their immediate capabilities. Based on the information received, the agency concluded that Ford and GM, constituting a substantial part of the industry, had taken or planned appropriate steps to meet the 27.5 mpg standard in MY 1986 and made significant progress toward doing so, but were prevented from fully implementing those steps by unforeseen events. The decline in gasoline prices, which began in 1982, had been expected to be temporary and quickly reverse, but instead continued. The agency concluded that, among other things, there had been a substantial shift in expected consumer demand toward larger cars and engines, and away from the more fuel-efficient sales mixes previously anticipated by GM and Ford. The agency's analysis indicated that this shift was largely attributable to the continuing decline in gasoline prices and that the only actions available to those manufacturers to improve their fuel economy in the remaining time for MY 1986 would have involved product restrictions likely resulting in significant adverse economic impacts, including sales losses well into the hundreds of thousands and job losses well into the tens of thousands, and unreasonable restrictions on consumer choice. That action was recently upheld by the D.C. Circuit Court of Appeals as consistent with the provisions of the Act and within the agency's discretion. (*Public Citizen* v. *National Highway Traffic Safety Administration,* 848 F. 2d 256, 264 (D.C.Cir. 1988))

The agency also lowered to 26.0 mpg the standards for MYs 1987–88. In this case as well, the agency determined that manufacturers had made reasonable efforts at compliance, but that these efforts had been overtaken by unforeseen events, whose effects could not be overcome by available means within the time available. NHTSA stated: "* * * both GM and Ford have continued to make significant technological improvements in their fleets and have had reasonable plans to meet CAFE standards. In a situation where unforeseen events, including changes in consumer demand or changes in the competition's product offerings, overtake a manufacturer's reasonable product plan, the agency does not consider it consistent with the Act to "hold" the manufacturer to carrying out a product plan that has become economically impractical." (51 FR 35611)

In evaluating the reasons for GM's and Ford's declining MYs 1987–88 CAFE projections, the agency noted that the companies appeared to be applying the same technologies as planned in late 1983. In the case of GM, NHTSA stated that the two major reasons for the decline in GM's CAFE projections were net engine and model mix shifts, and engine and transmission improvement programs not yeilding projected gains. The great majority of the factors reducing Ford's CAFE projections were due to net shifts in projected sales for models and engines, engine efficiency improvements not yielding projected gains, and new models not meeting initial weight targets. The agency thus concluded that the major reasons for the decline in both GM's and Ford's MYs 1987–88 CAFE projections were largely beyond those companies' control. (51 FR 35610) NHTSA's analysis further indicated that the only actions then available to those manufacturers to raise the fuel economy in their domestic fleets to 27.5 mpg in MYs 1987–88 would involve a combination of (1) product restrictions likely resulting in significant adverse economic impacts, including substantial job losses and sales losses and unreasonable restrictions on consumer choice, and (2) transfer of the production of large cars outside of the United States, thereby costing American jobs, while having absolutely no energy conservation benefits. (51 FR 35594)

III. Petitions To Amend the Model Year 1989 and 1990 CAFE Standards

The agency received five petitions to amend the passenger car CAFE standards for MYs 1989 and 1990. All petitions seek rulemaking to lower those CAFE standards, with four of the petitions requesting a lower standard based on the reported prospective inability of automobile manufacturers to meet the statutorily set standard of 27.5 mpg. The fifth petition requests a lower standard based on the contention that the CAFE program has caused an increase in motor vehicle fatalities. A brief summary of each petition follows.

A. Manufacturer Petitions

Automobile Importers of America, Inc.

On February 12, 1988, the Automobile Importers of America, Inc. (AIA) petitioned the agency to reduce the passenger automobile CAFE standards to 26.0 mpg for MYs 1989 and 1990. (Docket No. PRM–FE–011; supplemented May 25, 1988, Docket No. PRM–FE–011A) AIA represents 19 automobile importers, including BMW, Fiat/Alfa Romeo, Honda, Hyundai, Isuzu, Jaguar, Mazda, Mitsubishi, Nissan, Peugeot, Porsche, Renault, Rolls-Royce, Saab-Scania, Subaru, Suzuki, Toyota, Volvo and Yugo. The basic thesis of the AIA petition is that the 27.5 mpg CAFE standard for MYs 1989 and 1990 is technologically infeasible and economically impracticable under Title V, because it will unduly restrict consumer choice. AIA states that there is no evidence that the situation which caused NHTSA to amend the MYs 1986–1988 CAFE standards, i.e., high consumer demand for better performing cars with more features, will not continue for 1989 and 1990 as it has in previous years.

The focus of the AIA petition is the fuel economy abilities of the single- and limited-line manufacturers, who, according to AIA, lack one crucial advantage of the American full-line manufacturers. They do not have a wide variety of sizes of smaller cars to average against their larger, higher performance cars. AIA also argues that these manufacturers have been at the forefront of implementing technological advances, including those that improve safety and fuel economy. However, AIA states that many of the safety advances pioneered by these manufacturers, such as antilock brakes and airbags, have a negative effect on fuel economy.

In addition, AIA makes several other points in support of its request to lower the standards. First, AIA states that the resultant savings from a CAFE standard of 27.5 mpg compared to those from a standard of 26.0 mpg would be equal to approximately one-tenth of one percent of all motor vehicle fuel consumed in the United States during 1986. Second, the group argues that the goals of EPCA have already been met, because the entire fleet of automobiles exceeds 27.5 mpg. Third, AIA says that the single-line or limited-line manufacturer is at a disadvantage with too-stringent CAFE standards. Since such a manufacturer does not sell smaller cars, it does not have the option of refusing to sell larger cars or of providing incentives for smaller cars.

Austin Rover

Austin Rover Group Limited petitioned the agency on March 8, 1988, to reduce the passenger automobile CAFE standards to 26.0 mpg for MYs

1989 and 1990. Austin Rover, in collaboration with Honda Motors, produces the Sterling automobile for sale in the United States. Austin Rover's basis for petitioning is that it is a single-line manufacturer of "executive class" automobiles, with no smaller models to offset the lower fuel economy of the executive class automobiles. Austin Rover's petition includes a listing of the various engine and vehicle parameters said to have been optimized for fuel economy. (Austin Rover is not a member of AIA.)

Mercedes-Benz of North America, Inc.

On March 16, 1988, Mercedes-Benz of North America (Mercedes) petitioned the agency to reduce the passenger automobile CAFE standard for MY 1989 and later model years to 22.0 mpg. Mercedes believes that this is the maximum achievable level, in the near term by most limited-line manufacturers which operate in a restricted market segment. (Mercedes is not a member of AIA.)

Mercedes' main argument is that limited-line manufacturers such as Mercedes have taken all steps necessary to reduce the fuel consumption of the vehicles they produce, and that the source of their inability to comply is the narrow market which they serve. Mercedes urges NHTSA, in setting the new CAFE standard for model year 1989 and beyond, to recognize that a manufacturer's ability (or failure) to comply depends primarily on the nature of consumer demand for its products.

Mercedes urges the agency to lower the standard, stating that NHTSA should not keep the standard at 27.5 mpg when it knows that the standard cannot be achieved by limited-line manufacturers such as Mercedes. Mercedes says that a CAFE standard set above the capabilities of a particular segment of the market is an anti-competitive regulation and strongly suggests that, accordingly, NHTSA has a statutory obligation to revise the standard for MY 1989 and beyond.

General Motors

On May 17, 1988, General Motors Corporation (GM) submitted a petition requesting the agency to amend the MYs 1989 and 1990 passenger car CAFE standards to the maximum feasible level. The GM petition did not provide specific data to support its request; instead, the petition indicated support of the petitions previously filed, endorsed the opening of rulemaking to establish the maximum feasible level for MYs 1989 and 1990, and referred the agency to GM comments submitted in connection with the AIA petition, and in connection with the agency's amendment of the MY 1986 and MYs 1987–88 passenger car standards.

B. CEI Petition

Competitive Enterprise Institute

The Competitive Enterprise Institute (CEI) petitioned the agency on April 11, 1988, to set the passenger automobile CAFE standard for MYs 1989 and 1990 at 24.0 mpg. CEI is the only petitioner whose request to reduce the CAFE standards is not based on arguments that some manufacturers currently are unable to meet the standards. Instead, CEI contends that the CAFE program is causing an increase in vehicle occupant fatalities and that a CAFE of 27.5 mpg for MY 1989 will result in increased deaths of 2,200 to 3,900 over the life of that year's fleet. Further, CEI asserts that neither Congress nor the agency consciously considered the possible adverse safety side effects of CAFE standards, and that the agency is therefore without power to adopt standards until it makes a specific finding that the savings in fuel is worth the increase in highway fatalities. CEI contends that 24.0 mpg is what the average new car fuel economy would be if there were no CAFE regulatory program, and uses this assumption as the basis for promoting 24.0 mpg as the appropriate level to set.

IV. Summary of Agency Response to Petitions

In reviewing the manufacturers' petitions to lower the CAFE standards for MYs 1989–90, the agency has attempted to apply the analytical approach it spelled out in the decisions to amend the standards for MYs 1986–88. Accordingly, the agency published a request for comments relating to the petitions (53 FR 8668, March 16, 1988) and followed up with specific information requests to several manufacturers. The purpose of this activity was to obtain information to allow the agency to assess the reasonableness of the manufacturers' efforts to achieve the 27.5 mpg statutory standard and to ascertain the maximum feasible fuel economy levels for MYs 1989 and 90. The initial responses to the notice and those requests were not sufficient to permit the agency to attempt to assess the reasonableness of manufacturer efforts to achieve the 27.5 mpg statutory standard. Recently, however, GM supplied information to NHTSA that is sufficient to permit the agency to go forward with this proposal. (All publicly available material supplied by GM is in the docket in this proceeding.) For purposes of a possible final rule, the agency will complete its analysis of GM's submissions, both as to whether they are sufficient for the agency to make a determination concerning the reasonableness of that company's efforts and, if so, whether GM in fact made reasonable efforts to meet the statutory standard for MYs 1989–90. This proposal will permit manufacturers and others to present data, views and arguments about retaining or reducing the standard. Accordingly, it requests information and comment from all interested persons on manufacturers' reasonable efforts and maximum feasible fuel economy levels.

As the agency set forth clearly in the decisions to reduce the MYs 1986–88 standards, NHTSA does not believe it can properly lower the statutorily set standard of 27.5 mpg unless it first can make a determination that manufacturers have made reasonable efforts to attain the standard. If the agency makes such a determination in this instance, it will analyze the industry's maximum feasible CAFE level, and adopt a standard in the range of 26.5 mpg to 27.5 mpg. As discussed more fully below, NHTSA believes the lower end of the range, 26.5 mpg, is appropriate given the agency's longstanding interpretation of the statutory requirement that standards be set at the "maximum feasible" level, taking industrywide considerations into account, and the CAFE projections and recent CAFE performance of manufacturers whose sales (individually or combined) represent a substantial share of the market. The high end of the range, 27.5 mpg, represents the current level of the standard.

With regard to CEI's petition, the agency seeks comment on the issues raised in the petition, as discussed later in this preamble.

V. Agency Analytical Approach in Amending Standards

When it adopted EPCA, Congress established a long-term obligation on the part of manufacturers to bring their fleets into compliance with the 27.5 mpg standard and provided for civil penalties for the failure to do so. While Title V provides no express guidance concerning the appropriate circumstances for the exercise of its discretion to amend, the agency has been guided by the purposes of EPCA and by the statutory scheme of Title V. As the agency has explained in its rulemaking actions lowering the MYs 1986–88 standards, it believes that the exercise of its discretion consistent with those factors is required by the provision in the Administrative Procedure Act stating that an agency's discretionary decision will be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (5. U.S.C. 706(2)(A))

For petitions requesting a reduction in an existing CAFE standard, the agency has stated previously that it would not lower the 27.5 mpg standard unless the agency could conclude both that the manufacturers have made reasonable efforts to comply with the prescribed standard *and* that the 27.5 mpg standard is above the "maximum feasible" level for the industry.

In administering the fuel economy program, NHTSA must take into account "industrywide considerations". This phrase also has been discussed in several previous documents. In its petition to lower the MYs 1989–90 standards, Mercedes proffered another interpretation of this term, to include European manufacturers, as a significant segment of the industry. The issue of industrywide considerations has been addressed on many previous occasions, and most recently in the April 26, 1988 agency denial of petitions to amend retroactively the MYs 1984 and 1985 passenger automobile CAFE standards. The agency reiterates its position below:

The CAFE statute requires that, for each model year, there be a single standard for all passenger automobile manufacturers not exempted under section 502(c). Section 502 does not state expressly whether the concept of feasibility is to be determined in setting passenger automobile standards on a manufacturer-by-manufacturer basis or on an industrywide basis. The agency has therefore long interpreted this section in a manner that is consistent with the legislative history of Title V. The conference report accompanying Title V states, with respect to determining the maximum feasible average fuel economy level:

> Such determinations should therefore take industrywide considerations into account. For example, a determination of maximum feasible average fuel economy should not be keyed to the single manufacturer which might have the most difficulty achieving a given level of average fuel economy. Rather, the [Administrator] must weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual automobile manufacturers. Such difficulties, however, should be given appropriate weight in setting the standard in light of the small number of domestic automobile manufacturers that currently exist, and the possible implications for the national economy and for reduced competition association (sic) with a severe strain on any manufacturer. However, it should also be noted that provision has been made for granting relief from penalties under section 508(b) in situations where competition will suffer significantly if penalties are imposed. (S. Rep. No. 94–516, 94th Cong., 1st Sess. 154–5 (1975))

This language expresses two themes: first, a Congressional goal of improved fuel economy for the nation and second, fuel economy standards which are set at the maximum feasible level. NHTSA has construed this language many times. For example, as the agency stated in the 1977 notice establishing the MYs 1981–84 standards for passenger automobiles, Congress did not intend that standards simply be set at the level of the single least capable manufacturer. Setting standards in that fashion would have vitiated the CAFE program. This point can be illustrated by considering the effects of setting a standard at 18.0 mpg, based on the capability of a single manufacturer with a market share of less than one percent. Such a standard would have no possible impact on the balance of the manufacturers which, together produce more than 99 percent of all cars and have higher average fuel economies.

Since this initial interpretation, the agency has expanded its position, noting that the statute contemplated that standards should not be set above the capability of manufacturers whose sales represent a substantial share of the market. (50 FR 29912, 29923) This would apply either to a single larger such manufacturer or to a combination of smaller manufacturers constituting together a substantial share of the market. In the final rule reducing the MYs 1987–88 standards, the agency concluded that the particular compliance difficulties of several of the European manufacturers, whose combined market share is relatively small, was not legally sufficient to justify a standard set for below the capabilities of the other manufacturers. (51 FR 35617)

The agency does not believe that Congress intended the CAFE standards to be governed by the abilities of a single, narrow segment of the industry, such as the projected 0.8 percent market share of Mercedes in MY 1988, or even the 6.7 percent combined market share of European manufacturers in that model year. (It also should be noted that the 6.7 percent reflects all European manufacturers; 3.2 of those 6.7 percentage points represent European manufacturers that already achieve or exceed 27.5 mpg, i.e., Volkswagen/Audi and Yugo.)

This statement is not intended as criticism of those manufacturers for not achieving 27.5 mpg CAFE, or as lack of appreciation for the difficulty caused to them by the CAFE program. On the contrary NHTSA believes that regulation of fuel economy by a single standard to be met on a corporate average basis—as required by Title V—is unfair to many manufacturers which produce larger cars (including full-line U.S. manufacturers as well as limited-line European producers). The burdens of the program fall entirely on the manufacturers which produce larger or higher performance cars, especially if they also do not have sufficient smaller or lower-performance cars that can be averaged into the same fleet. Other manufacturers, including a number of major importers, are, as a practical matter, not required to take any actions to improve fuel economy or change product offerings. Moreover, these other manufacturers can produce smaller and mid-size cars that compete against those of the full-line manufacturers, without concern as to how much fuel economy technology is incorporated in the cars. This results in a potential cost advantage for these manufacturers—and a competitive disadvantage for the companies that also produce larger cars. This overall issue is one of the reasons NHTSA has recommended repeal of the CAFE program. Unfortunately, the Act does not permit the agency to set the standard based on the discriminatory impact on a small portion of the market, even though the agency is keenly aware of the practical problems it presents to many manufacturers.

Clearly, NHTSA's decade of consistent interpretation of the statutory scheme cannot be abandoned without good cause, and the agency is not persuaded that Mercedes' petition demonstrates that the agency's consistent interpretations are erroneous. While the agency appreciates the frustration of the limited-line manufacturers which believe that they have achieved their own individual maximum feasible levels of fuel economy and still fall short of the CAFE standard, it notes that the manufacturers are pursuing an administrative solution to a legislative problem. These manufacturers really are alleging that they can *never* meet the statutorily set standard of 27.5 mpg, due to the market segment in which they compete. This, however, is inherent in a statutory scheme in which single standards must be set on the basis of the entire industry, but met by individual manufacturers. In this case, the appropriate solution to the dilemma faced by these manufacturers can be obtained only from Congress, not from NHTSA.

NHTSA believes that the approach regarding "industry-wide" considerations used in its determinations of "maximum feasible" also is appropriate in its determination of reasonable efforts. Accordingly, the agency believes that it is inappropriate to base a determination of reasonable efforts or maximum feasible level solely on any market segment which does not represent a substantial share of the industry. For this reason, in today's analyses, the agency principally considered the efforts of Ford and GM, since either of their sales represents a substantial share of the market.

VI. Reasonable Efforts Analysis

A key issue in deciding whether to exercise its discretion to amend the statutorily set CAFE standard for passenger automobiles of 27.5 mpg is a determination by the agency that manufacturers have made reasonable efforts to meet the standard. The agency has explained its reasonable efforts analysis in several previous documents, including the rulemakings lowering the MY 1986 and MYs 1987–1988 passenger automobile CAFE standards and the document denying the petitions by Mercedes and GM to amend the MY 1984 and 1985 passenger automobile CAFE standards. (For MY 1986, see 50 FR 40528, October 4, 1985; for MYs 1987–1988, see 51 FR 35594, October 6, 1986; for the petition denial for MYs 1984–1985, see 53 FR 15241, April 28, 1988.) Because this determination is critical to the agency's decision whether or not to amend the CAFE standards for MYs 1989 and 1990, the agency repeats its rationale below.

The agency sees the determination of reasonable efforts as a necessary step to amending a given year's CAFE standard. Since Title V imposed a long-term obligation on manufacturers to achieve a 27.5 mpg fuel economy level, the agency could not properly exercise its limited statutory discretion to amend the standard if the current inability to meet the standard resulted simply from manufacturers previously declining to take steps needed to improve their average fuel economy as required by the Act. Therefore, the agency must evaluate the manufacturers' past efforts to achieve higher levels of fuel economy, as well as their current capabilities.

The agency's evaluation of the reasonableness of manufacturer efforts is not only a prudent but also a necessary step. To reduce a standard notwithstanding the absence of reasonable efforts would be an abuse of discretion i.e., beyond the agency's limited administrative authority under the Act. In its recently-issued opinion upholding NHTSA's reduction of the MY 1986 CAFE standard for passenger automobiles and citing approvingly the "reasonable efforts" test, the Court of Appeals for the D.C. Circuit said that "(l)owering the standard whenever the larger manufacturers assert current inability to meet that standard would, without doubt, completely vitiate the statutory scheme." *Public Citizen* v. *National Highway Traffic Safety Administration*, 848 F. 2d 256, 264 (D.C.CIR. 1988).

In reviewing the current requests to lower the standard, the agency needs to analyze the statements and actions of the manufacturers particularly carefully, in view of the amount of time which has passed since the events which led to the reduction of the MYs 1986–88 CAFE standards for passenger automobiles (i.e., the unexpected decline in gasoline prices during the early 1980's, leading to increased consumer demand for larger, more powerful, less fuel-efficient vehicles). The significance of the increasing length of this interval of time was noted in *Center for Auto Safety, et al.* v. *Thomas*, a recent case considered by the full D.C. Circuit Court sitting *en banc* concerning EPA's adjustments to the formula for computing manufacturers' actual CAFE levels. In that case, one-half of the evenly-split court observed: "Whatever the barriers to changing MY 1987 and 1988 vehicles as of August 20, 1985, it is uncontested that, MY 1990 and MY 1991, the auto manufacturers could have redesigned their vehicle offering to enhance fuel economy." 847 F. 2d 843, 858 (D.C.Cir. 1988) (per curiam).

In evaluating the manufacturers' past efforts to achieve compliance with a standard of 27.5 mpg consistent with section 502(e) of the Cost Savings Act, and as noted in the two previous rulemakings lowering the 27.5 mpg standard, the agency does not consider it appropriate to judge each and every manufacturer product action by 20–20 hindsight. Instead, the agency reviews the manufacturers' fuel economy efforts in light of "the information available to manufacturers at the time product decisions were being made."

For MY 1986, and again for MYs 1987–88, the agency determined that GM and Ford had plans adequate to meet the 27.5 mpg standard, but that these plans were overtaken by unforeseen events in the early 1980's. The agency identified a number of factors which led to lower than expected CAFE levels, including the dropping price of gasoline and a related increase in expected consumer demand for larger and more powerful cars. The agency concluded that the manufacturers did not have time to offset the impact of these unexpected events by developing and implementing supplementary or alternate plans for meeting the CAFE standard of 27.5 mpg for MYs 1986–88.

The agency also noted in both the MY 1986 rulemaking and the MYs 1987–88 decision that Title V contemplates that manufacturers would have to adopt intensified and/or supplementary methods of compliance in the event that previous plans were unsuccessful. The fact that adequate plans had been overtaken by unforeseen events in the early 1980's was only a temporary justification for not achieving the long-term 27.5 mpg CAFE goal set by Congress. The agency noted in these previous determinations that in view of the statutory program of mandatory maximum feasible standards:

> Manufacturers had an obligation to take whatever steps were necessary consistent with the factors of section 502(e). (My 1986 final rule, 50 FR 40528)
>
> On the other hand, as it becomes apparent that additional application of technology, such as further penetration of front-wheel drive or additional use of material substitution, is necessary to meet CAFE standards, manufacturers must initiate efforts to redesign and replace their older cars as necessary to meet such standards. (51 FR 35594, 35611)
>
> The agency also emphasized that while changes in product plans which may, as an unintended effect, reduce CAFE, are consistent with the statutory criteria to the extent that they reflect changes in what is economically practicable, manufacturers recognizing the consequences of such changes must then pursue additional means, consistent with the factors of section 502(e), to meet the standards. (MY 1987–88 rulemaking, referring to and affirming the analysis in the MY 1986 rulemaking, 51 FR 35594, 35600)

Given the passage of time since those unforeseen events in the early 1980's, coupled with the agency's understanding of traditional auto industry leadtimes to introduce new technologies or new vehicles, the agency could not reasonably base an exercise of its discretion to amend the MY 1989–90 standards on the same set of facts that supported the reduction of the MY 1986–88 standards. The agency will need to know whether, and to what extent, the industry as a whole made new reasonable plans to comply with the 27.5 mpg standard after the unanticipated events of the early 1980's derailed the previous plans.

To help it assess the reasonableness of manufacturer efforts, the agency published a fuel economy questionnaire in the **Federal Register** (March 16, 1988, 53 FR 8668) and mailed copies of the questionnaire to nine manufacturers, both domestic and import. NHTSA subsequently sent follow-up questions to six manufacturers. The questions asked for, among other items, specific explanations of what events had occurred or circumstances had changed to create a compliance problem now. The agency asked manufacturers to provide a description of specific actions taken to achieve 27.5 mpg in MY 1989 and beyond, the impact of those actions, and why the original assessment of these actions is no longer valid.

The initial responses did not provide sufficient information for NHTSA to attempt to assess the reasonableness of manufacturer compliance efforts. However, in early August, GM (which constitutes a substantial share of the industry) provided a considerable amount of additional information and arguments on this issue, the public version of which is in the docket of this proceeding. The agency has not completed its analysis of the new GM materials. However, NHTSA has concluded that GM provided sufficient information for the agency to go forward with rulemaking, including seeking public comment on GM's arguments. As indicated above, for purposes of a possible final rule, the agency will complete its analysis of GM's submissions, both as to whether they are sufficient for the agency to make a determination concerning the reasonableness of that company's efforts and, if so, whether GM in fact made reasonable compliance efforts under the statute. Of course, all other submissions and arguments received during the comment period will be analyzed as well.

GM's arguments can be summarized as follows. That company states that at all times it has made plans to comply with the legislated 27.5 mpg standard, but those plans have been overtaken by unforeseen events beyond its control. According to GM, just as events in the early and mid-1980's overwhelmed its expectation that it would meet the 27.5 mpg standard in 1986–88, similar events, including an uprecedented precipitous 28 percent drop in gasoline prices over the 1986 model year (which was in addition to a 27 percent drop in gasoline prices spread between 1981 and 1985), coupled with radical changes in the competitive environment that characterized the mid- and late 1980s, have overtaken its plans for the 1989–90 time frame. More specifically, GM argues the following:

1. GM consistently planned for compliance with the 1989–90 standards. Immediately after the 28 percent drop in gasoline prices over the 1986 model year, GM could not forecast CAFE compliance without plant closings and layoffs. As prices stabilized at the lower levels, subsequent compliance planning called for long-term compliance through a continued aggressive presence in the fuel-economy conscious segments in the market and introduction of more fuel-efficient and better performing powertrains. However, given the magnitude of the gasoline price drop and the need to assure long-term competitiveness by responding to anticipated changes in consumer expectations, GM also forecast the need for some limited market-forcing actions to achieve compliance over the intermediate term, including 1989 and 1990.

2. Compliance actions were successfully implemented. In the 1986 to 1988 period, GM's compliance efforts were rewarded by a continually improved CAFE. These efforts included, for example, continued introduction of new powertrains like the 16-valve QUAD IV and 3800, and new production platforms like the Beretta and Corsica. For 1989, GM is introducing the 3300 engine which is expected to have better driveability and be more fuel efficient than its 3.0L predecessor. Additionally, GM has continued to maintain an aggressive competitive presence in the fuel-economy conscious segments of the markets.

3. Unexpectedly high CAFE levels achieved by GM in recent years result from temporary or one-time aberrations and should not be viewed as representing a new " base" or trend for future year performance. The success, which exceeded expectations, was derived in part from unanticipated fuel economy performance on EPA tests that cannot reasonably be forecast to be repeated in future model years. Other sources of aberrations from long-term expectations included an extented 1988 model year for the Beretta and Corsica which alone accounts for an estimated 0.1 mpg in MY 1988 CAFE performance. Also, beyond these aberrations, there is a downside to GM's unexpectedly high CAFE. One contributing element has been a lower than forecast level of sales of midsize, larger and luxury models owing in part to downsizing and small engine programs that, in GM's view, may have been too agressive given recent gasoline prices. This has had a very real cost in lost employment at plants like Detroit-Hamtramck that have barely sufficient demand for one shift of production of E/K bodies (e.g., Buick Riviera). Looking to the future, GM programs hope to increase sales of these vehicles and restore employment with restyling and driveability improvements, albeit while trying to minimize the CAFE penalty.

4. Changing circumstances render current 1989–90 plans impracticable. As GM entered the 1988 model year, it began to appear that previously forecast 1989 and 1990 compliance actions were no longer likely to be economically practicable risks, with GM domestic U.S. passenger car market share reduced 6.1 points from the 1986 model year. For example, previously anticipated potential market forcing actions began to appear impracticable with unexpected volume declines that led to the idling of the Leeds, Missouri, J-car assembly facility and a several month layoff of the Framingham, Massachusetts, A-car assembly facility—both despite incentive programs and attractive 1988 pricing for those vehicles. Moreover, the intensified competition now expected from foreign manufacturers and other factors leaves no room for product compromises previously thought to be acceptable.

5. GM is pursuing strategies for future compliance. Plans now under management review are expected to yield compliance with the 27.5 mpg standard in the future.

GM provided a variety of supporting materials, including explanations of why its CAFE projection declines from MY 1988 to MY 1989 and from MY 1989 to MY 1990, why it achieved higher than projected CAFE levels for MY 1986–88, and why its MY 1989–90 CAFE projections have decreased over time; discussions of compensating actions to improve 1989 CAFE after its July 1986 projection that it likely would be below 27.5 mpg, gasoline price effects on CAFE, technology improvements and cost effectiveness, and technology update; the results of a survey related to consumer demand for performance; and information about its 1989 and later model year compliance plan, including a discussion of the impacts of product restrictions, characterized by that company as "one means of assuring compliance at the cost of jobs, consumer choice and national economic harm," and its CAFE compliance planning from 1986 to the present.

NHTSA notes that Ford also provided new information in August 1988 concerning reasonable efforts. However, the information provided was insufficient for the agency to analyze whether that company made reasonable efforts to achieve 27.5 mpg in MYs 1989–

90. In particular, the agency does not have sufficient information to analyze the timing of when Ford first realized that its product plans might not result in 27.5 mpg CAFE and what compensating actions that company initiated or considered at and since that time to improve its CAFE. Depending on the comments that Ford may submit in response to this notice, the agency may, of course, be able to make such a determination for purposes of a possible final rule.

In an earlier submission, Ford indicated that its compliance with the statute would be achieved by using credits earned by exceeding the standard in other years. NHTSA notes that *if* that company decided not to make efforts to achieved 27.5 mpg in MYs 1989–90 in light of credits from other years, such a decision would be perfectly acceptable under the statute. However, if a manufacturer chooses, in light of the flexibility offered by the credit provisions, not to make the reasonable efforts necessary to achieve the level of a standard for a particular model year, it would be clearly inconsistent with the statutory scheme for the agency to then exercise its discretion to lower the standard solely on the basis of that manufacturer's inability to meet the standard.

In analyzing whether manufacturers made reasonable efforts, the agency is attempting to answer the questions which follow. NHTSA notes that manufacturers have already provided information relevent to some of the questions, as well as to some of the questions which appear later in this notice. The agency is continuing to analyze those manufacturer submissions. Copies of the manufacturer submissions are in the public docket (Docket FE–88–01, Notice 1, or Docket PRM–FE). (Information subject to a claim of confidentiality is not included in the docket versions.) NHTSA invites interested persons to submit any information which would aid the agency in answering those questions, and encourages manufacturers to expand on prior submissions if doing so would more fully address the issues raised in this notice.

1. In considering a possible reduction in the MYs 1989–90 standards, how should the agency evaluate the sufficiency of manufacturer efforts to meet the standard? If manufacturer plans are found to have been reasonable, what additional actions should be expected of them, once compliance difficulties are evident? Should the agency consider a second round of investments or product decisions to be "economically practicable" or otherwise compelled by the statute within the timeframe in question?

2. NHTSA requests information and comments concerning the plans developed by manufacturers to achieve 27.5 mpg for MY 1989–90 *after* the unexpected gasoline price reductions of the early to mid-1980's, particularly that of 1986.

3. All full-line manufacturers projected exceeding 27.5 mpg for MY 1989–90 as recently as October 1985. The agency seeks information about what changed since those projections were made, leading to lower projections for MYs 1989–90.

4. For manufacturers which once expected to achieve or exceed 27.5 mpg in MYs 1989–90 but no longer project doing so, the agency requests detailed information concerning the timing of when a possible shortfall was first recognized, the reasons for the shortfall as compared with the earlier projections, and what compensating actions were implemented, formulated, and/or considered since that time to improve CAFE. What happened to any such plans in the intervening time? If plans were formulated but not implemented, why not?

5. How is leadtime relevant to evaluating the sufficiency of manufacturer efforts to meet the standard? NHTSA notes that if a manufacturer recognized a possible shortfall in mid-1986 for MYs 1989–90, there would have been more than two years of leadtime for MY 1989 cars and more than three years of leadtime for MY 1990 cars. Was this sufficient leadtime to improve CAFE by additional technological improvements for MY 1989 and/or MY 1990? In addressing this issue, please discuss the leadtimes for making various technological changes, both for existing cars and as part of new car designs. NHTSA notes with respect to this issue that an August 15, 1988 *Automotive News* article reported that GM "says it has found a new way of developing products in as little as three years instead of the usual five years from first design rendering to Job One." Could a manufacturer have designed an all-new car, as of mid-1986, for MY 1990? If there were sufficient leadtime for MY 1989 and/or MY 1990 to make additional fuel-economy-enhancing technological improvements (whether for existing cars or as part of new car designs) and yet those changes were not made, how should the agency assess the reasonableness of not making such changes?

6. In comparing the largest domestic manufacturers, the agency notes that Ford's CAFE is currently below that of GM. For MY 1988, Ford projects CAFE of 26.4 mpg, while GM projets 27.6 mpg. What accounts for this difference? The agency seeks comments on the significance, if any, of this difference, as well as information to help the agency understand the reasons for the difference.

7. Ford's CAFE has remained relatively flat for several model years and is projected to continue to do so. What relevance, if any, does this have in analyzing whether Ford made reasonable efforts to achieve 27.5 mpg for MY 1989–90?

8. GM's MY 1988 Mid-Model Year Report projects a CAFE level of 27.6 mpg. Why is GM's CAFE projected to decline in MYs 1989–90? What relevance, if any, does this have in analyzing whether GM made reasonable efforts to achieve 27.5 mpg CAFE in MYs 1989–90?

VII. Elements of Setting a Standard

The CAFE statute requires that the agency set a standard at the "maximum feasible level", which consists of four factors: Economic practicability, technological feasibility, the need of the Nation to conserve energy, and the effect of other Federal standards. The agency has explained and weighed these factors each time it has adopted or amended a CAFE standard.

A. Need of the Nation To Conserve Energy

Since 1975, when the Energy Policy and Conservation Act was passed, this nation's energy situation has changed significantly. Oil markets were deregulated in 1981, permitting consumers to make choices in response to market signals and allowing the market to adjust quickly to changing conditions. The U.S. Strategic Petroleum Reserve (SPR) was built to ensure a supply of oil during any major supply disruption. In June 1988, the SPR contained 550 million barrels of oil, stored principally in underground caverns, that could be pumped back to the surface if needed.

1. Petroleum Imports and Prices

The United States imported 15 percent of its oil needs in 1955. The import share had reached 36.8 percent by 1975, and peaked at 46.4 percent in 1977, at a cost of $71 billion (stated in 1986 dollars). While the import share of total petroleum supply declined after that year, the cost continued to rise to a 1980 peak level of $99 billion (1986 dollars).

By 1985, the import share had declined to 28.7 percent at a cost of $52 billion (1986 dollars). In addition, imports from OPEC sources declined through 1985, from a high of 6.2 MMB/D and 70.3 percent of all imports in 1977 to 1.8 MMB/D barrels per day and 36.2 percent of imports in 1985.

Since 1985, the import share of petroleum supply has been increasing. Between 1985 and 1986, net imports rose from 28.7 percent of the U.S. petroleum supply to 34.6 percent. In 1987 that figure was 37.1 percent, and for the first six months of 1988, net imports accounted for 38.1 percent of total supply. Due to sharply lower petroleum prices, however, the value of imports declined from 1985 to 1987, from $52 billion to $43 billion (1986 dollars).

Imports from OPEC sources have also increased. Between 1985 and 1986, imports from OPEC rose from 36.2 percent of all imports to 45.6 percent. In 1987 that figure was 45.8 percent, and for the first five months of 1988, imports from OPEC accounted for 46.4 percent of all imports.

2. Continued Need for Progress

Despite the progress which has been made, both within and outside the transportation sectors of the economy, the current energy situation and emerging trends point to the continued importance of oil conservation. Oil continues to account for well over 40 percent of U.S. energy use, and 97 percent of the energy consumed in the transportation sector. While the U.S. is the second-largest oil producer, it contains only four percent of the world's proved oil reserves. Moreover, proved reserves have declined from a peak of 39.0 billion barrels in 1970 to 26.9 billion barrels in 1986.

According to 1987 Energy Information Administration (EIA) projections, domestic production is expected to decline from 10.0 MMB/D in 1987 to between 8.3. and 9.3 MMB/D in 1995 and between 7.9 and 9.1 MMB/D in 2000, depending on the price of oil. (Data available for the first six months of 1988 indicate domestic production at 9.94 MMB/D.) Net imports are projected to increase from 5.9 MMB/D in 1987 to between 7.4 and 10.5 MMB/D in 1995 and between 7.6 and 11.7 MMB/D in 2000. Thus, as a percentage of total U.S. petroleum use, EIA expects imports to rise from a 1987 level of 37 percent to between 44 and 56 percent of total supply in 1995 and between 46 and 60 percent in 2000. NHTSA notes, however, that future projections about petroleum imports are subject to great uncertainty. For example, the EIA's 1977 Annual Report to Congress projected that net oil imports by the U.S. would, in the "reference case", reach 11 MMB/D by 1985. Net imports in 1986 actually were 5.4 MMB/D, less than half the level predicted in 1977.

The level of oil imports remains an issue for the nation as a whole. In 1987, the U.S. imported $411.3 billion worth of goods and exported $257.6 billion, resulting in a deficit of $153.7 billion. To the extent that oil imports remain steady or decrease, instead of increasing, there is a positive effect on the nation's balance of trade problem.

In March 1987, the Department of Energy submitted a report to the President entitled "Energy Security". NHTSA believes that the following quotation from that report represents a useful summary of the current energy situation and national security:

> Although dependence on insecure oil supplies is * * * projected to grow, energy security depends in part on the ability of importing nations to respond to oil supply disruptions; and this is improving. The decontrol of oil prices in the United States, as well as similar moves in other countries, has made economies more adaptable to changing situations. Furthermore, the large strategic oil reserves that have been established in the United States (and to a lesser extent, in other major oil-importing nations) will make it possible to respond far more effectively to any future disruptions than has been the case in the past.
>
> The current world energy situation and the outlook for the future include both opportunities and risks. The oil price drop of 1986 showed how consumers can be helped by a more competitive oil market. If adequate supplies of oil and other energy resources continue to be available at reasonable prices, this will provide a boost to the world economy. At the same time, the projected increase in reliance on relatively few oil suppliers implies certain risks for the United States and the free world. These risks can be summarized as follows: If a small group of leading oil producers can dominate the world's energy markets, this could result in artificially high prices (or just sharp upward and downward price swings), which would necessitate difficult economic adjustments and cause hardships to all consumers.
>
> Revolutions, regional wars, or aggression from outside powers could disrupt a large volume of oil supplies from the Persian Gulf, inflicting severe damage on the economies of the United States and allied nations. Oil price increases precipitated by the 1978–79 Iranian revolution contributed to the largest economic recession since the 1930's. Similar or larger events in the future could have far-reaching economic, geopolitical, or even military implications.

B. Effect of Other Federal Standards

In determining the maximum feasible fuel economy level, the agency must take into consideration the potential effects of other Federal standards. The following section discusses other government regulations—both in process and recently completed—that may have an impact on fuel economy capability.

1. NHTSA Standards

Several relatively recent changes in Federal safety and damageability requirements could have an effect on CAFE. These include a May 1982 amendment to the Part 581 Bumper Standard reducing the standard's impact protection requirements and thereby permitting weight savings; an amendment to the agency's lighting standard, which permits greater aerodynamic efficiency; and implementation of automatic restraint requirements.

The bumper standard was amended for 1983 and later model years to provide for a 2½ mph impact test speed (compared to an earlier 5 mph impact test speed). The regulatory analysis accompanying this rule noted that manufacturers could realize a weight savings of from 15 to 33 pounds. This could produce a gain in fleet average CAFE capability of 0.2 mph to 0.5 mph. In the past, however, the agency has not factored in any CAFE advantage, because manufacturers have indicated that they continue to comply, on a voluntary basis, with the 5 mph standard. The agency endorses the voluntary use of 5 mph bumper systems.

The agency modified its Federal Motor Vehicle Safety Standard 108, Lamps, Reflective Devices, and Associated Equipment, to permit the use of replaceable light source headlamps, smaller sealed beam headlamps, and lower headlamp mounting height. The PRIA concludes that the ability to redesign headlamps in this way could result in a 2 to 3 percent improvement in aerodynamic drag. This in turn could produce a 0.4 to 0.9 percent improvement in fuel economy. For a 27.5 mpg fleet, this would equate to a 0.11 mpg to 0.25 mpg improvement in CAFE if all vehicles in that fleet employed the new lamp designs. Both Ford and GM are making extensive use of this new flexibility.

However, GM also notes in its August 1988 docket submission that composite headlamps have been partially responsible for its "C" and "H" carlines moving into a higher EPA test weight category, producing a negative CAFE effect. The agency seeks specific data concerning any negative impact manufacturers believe using this design flexibility has on CAFE levels.

A July 1984 amendment to Federal Motor Vehicle Safety Standard 208, Occupant Crash Protection, specified the phase-in of automatic protection requirements beginning in model year 1987, with 40 percent phased in by MY 1989 and 100 percent implementation by MY 1990. The agency has developed its own estimate of the average incremental weight of automatic restraint systems. As noted in the PRIA, the agency's current best estimates of typical system incremental primary weights over manual belts are as follows: Front seat airbag, approximately 21 pounds; non-motorized automatic belts, approximately 11 pounds; and motorized automatic belts, approximately 15 pounds. Neither GM or Ford claimed during the Standard 208 rulemaking a specific weight penalty associated with these 208 requirements. Both stated, however, that there would be weight increases, and depending on the success or failure of weight-reducing efforts, as well as some weight-increasing pressures (options packages), that it is not unlikely that certain vehicles equipped with automatic restraints could result in the vehicle being placed in the next higher test weight class. This would have a negative effect on fuel economy. The agency seeks specific information from manufacturers to the extent the information demonstrates specific net weight effects of this standard.

On January 27, 1988, the agency published a proposed rule (53 FR 2239) to upgrade its test procedures and performance requirements for side impact protection for passenger cars. The agency is focusing on two ways of improving the side impact performance of passenger cars: Adding padding on the door and increased structure to reduce intrusion. Specific weight penalties are not known yet, and will depend on such factors as final performance requirements, chosen countermeasure, and baseline vehicle performance. The agency has not considered any negative effect of this proposed standard on CAFE performance, since any final rule on this subject would not apply to the model years under consideration in this rulemaking.

On June 16, 1987, the agency published an advance notice of proposed rulemaking (52 FR 22818) requesting comments on the possible requirement to install lap/shoulder belts in rear seating positions of passenger cars, multipurpose vehicles and small buses. The agency anticipates that any additional weight penalty for this requirement would be minimal, with the current estimate of 0.6 pounds for each outboard seat and 2.4 pounds for the center seat. The agency has not considered this weight penalty in its evaluation of fuel economy and notes that essentially all manufacturers indicate that they will achieve voluntary compliance with this requirement for all of their passenger cars by MY 1990.

2. EPA Noise Standards

The agency is not aware of any plans on the part of the Environmental Protection Agency to promulgate noise regulations during the time period under discussion. Accordingly, no fuel economy penalties from noise regulations have been forecast.

3. Emissions Standards

EPA has not announced any plans to modify its current exhaust emission control requirements for hydrocarbons, carbon monoxide and oxides of nitrogen. Therefore, the agency has not considered any further impacts on fuel economy from control of these pollutants. As discussed in the PRIA, the agency has analyzed previously the effects of the current requirements on fuel economy.

Also discussed in the PRIA is EPA's tightening control of particulate matter that became effective in MY 1987. While this requirement applies to all vehicles, the only current production powerplant which will have difficulty meeting this requirement is the diesel engine. EPA has indicated that there is a 1 to 2 percent fuel economy penalty for diesel powered vehicles which require a particulate trap to comply with the standard; however, the agency believes that only a very small fraction of the diesel vehicles (those with larger displacement engines) will need traps for compliance.

In July 1987 EPA issued a proposed rule on the on-board control of refueling emissions. The proposal would limit gasoline vapor emissions to 0.10 grams of vapor per gallon of dispensed fuel. The agency has not taken this future rulemaking into its estimates of CAFE levels for two reasons. First, the final rule, when issued, will not take effect until two model years after that point, which is beyond the model years that are the subject of this rulemaking. And second, the real weight impact is not clear. EPA estimates that this regulation would add about 4–5 pounds to a vehicle, which could reduce the average Ford or GM fleet CAFE by 0.04 mpg. There is additional concern that this requirement could affect compliance with the exhaust emissions requirements and degrade fuel economy. This may happen because canister purging may occur when the engine is least likely to be able to compensate for it. Ford also claims that the increase in test fuel volatility (RVP) will increase HC and CO emissions.

The California Air Resources Board (CARB) has adopted a new requirement which will require 50 percent of all MY 1989 light duty passenger cars and 90 percent of MY 1990 passenger cars to meet a 0.4 gm/mi NO_x standard. GM has indicated that this requirement will result in a 4 to 5 percent negative impact on the fuel economy of approximately 300,000 of its vehicles. Ford has not claimed specific CAFE losses due to the California NO_x requirements. Half of all vehicles certified to the Federal NO_x standard, are already below the California standard of 0.4 gm/mi level. While they may not be far enough below to ensure compliance, CARB believes that its standard can be met with little or no degradation in fuel economy using refined emission control technology calibrations and higher catalyst loadings. NHTSA does not see whatever small penalty there may be while manufacturers gain experience certifying at this new level, as significant or long-lasting.

4. EPA Test Procedure

The Environmental Protection Agency published a final rule on July 1, 1985, providing CAFE adjustments to compensate for the effects of past test procedure changes (See 50 FR 27172). The final rule adopted a formula approach for calculating CAFE adjustments. The manufacturer projections discussed above include the effect of the EPA test adjustment credit. Due to the formula approach, the specific value of the credit may vary for different model years and among manufacturers. A typical credit for the model years in question would be 0.2–0.3 mpg.

C. Industry Capability: Technological Feasibility and Economic Practicability

1. Manufacturer CAFE projections

In response to its questions published in the **Federal Register**, the agency received comments from 11 manufacturers, the Competitive Enterprise Institute, and one member of Congress. The agency submitted additional questions to six manufacturers, who responded in May of this year. GM and Ford both project falling short of the 27.5 mpg standard for MYs 1989–90, for their domestic fleets, although GM's April 1988 comments indicate that it will achieve 27.6 mpg in MY 1988. Chrysler indicates that it will achieve or exceed the 27.5 mpg CAFE level for MYs 1989–90, with projections of 27.6 mpg for MY 1989 and 27.9 mpg for

MY 1990. In addition, many importers (those which specialize in smaller vehicles) currently have fleets above the CAFE statutory standard of 27.5 mpg, including: Mazda, Subaru, Suzuki, Toyota, Volkswagen, Mitsubishi, Nissan, Isuzu, Yugo, Honda, and Hyundai. (This also is true of GM's and Ford's imported passenger fleets, which are required by the statute to meet the CAFE standard separately from their domestic fleets.)

Manufacturers indicating that they may not meet the CAFE standard of 27.5 mpg in MYs 1989 and 1990 include Ford and GM (domestic fleets) and several limited product-line manufacturers, including Volvo, Saab, Mercedes-Benz, Jaguar, Porsche, BMW, Austin Rover, and Peugeot. GM, Mercedes-Benz, and Austin Rover each submitted a petition to lower the standard. The remaining foreign manufacturers are all members of AIA, which also submitted a petition to lower the standard.

Since either Ford or GM alone would constitute a substantial share of the market, and both manufacturers project MYs 1989–90 CAFE levels below 27.5 mpg, the agency focused on their projections in its analysis of industry projections.

Ford provided in its April 12, 1988, submission an analysis of how its earlier projections of 27.6 mpg for MY 1989 and 27.7 mpg for MY 1990 projected on October 23, 1985, had declined to the present estimates of 26.6 mpg for both years. The principal reason for the decline is attributed to technical changes, primarily weight increases (due to occupant protection systems required by Standard 208; see discussion in previous section of this Preamble) and lower than expected fuel economy of several series. Ford has partially offset these losses, however, by implementing some small engine improvements and achieving weight reduction in other models. Sales mix shifts have resulted in a decrease in CAFE, as has decreased marketing efforts and delays in product introduction. Ford identifies several risks for its projections, and offsetting opportunities.

As indicated previously, GM characterizes its projected MY 1988 CAFE of 27.6 mpg as a surprise. While this performance can be seen as prima facie evidence that GM is making reasonable efforts to achieve 27.5 mpg, the achievement also raises the issue of why achieving 27.5 mpg is not feasible for MYs 1989 and 1990 as well. GM indicates that the unexpected MY 1988 CAFE level was the result of unanticipated fuel economy performance in EPA tests, which cannot be considered necessarily repeatable, and the extended model year for the Beretta and Corsica.

In fact, GM indicates that its CAFE level will drop over the next two years, from 27.6 mpg in MY 1988, to 27.1 mpg in MY 1989 and 26.9 mpg in MY 1990. GM identified several reasons for this drop in its projected CAFE, including continued growth in demand for larger cars and higher performance (ascribed to lower gasoline prices) and import competition with small cars.

In response to an additional request from the agency, GM submitted detailed variance analyses to explain GM's efforts in attaining the statutory CAFE compliance level. GM provided the agency with specific analyses for different mpg changes, model mix changes and engine mix changes. Examples of the types of changes which result in GM projecting a drop in its fleet's CAFE for MYs 1989–90 include the following:

GM projects a positive net CAFE change due to all model mix shifts between the 1988 and 1989 model years of 0.01 mpg. GM indicates that the largest effect in this category is due to the discontinuation of its "G" models. For MYs 1989–90, GM indicates a negative net CAFE change of 0.06 mpg due to model mix shifts, the details of which were submitted under a claim of confidentiality.

GM also provided details on changes in its CAFE projections based on engine mix shifts and mpg changes. GM describes changes to components and systems to improve the engine quality and reliability, and performance. Changes include technology updates to the fuel injection systems, the addition of newer, high technology engines, increased V–6 volume, and other changes in response to indications of consumer preference.

NHTSA is in the process of analyzing the manufacturers' MYs 1989–90 CAFE projections. Among other things, the agency is attempting to answer the following questions:

9. Both GM and Ford have exceeded a number of the MYs 1986–88 CAFE projections they provided to the agency during the rulemakings for those model years. For example, GM exceeded its MYs 1986–87 projections by 0.3 mpg and 0.4 mpg, respectively, and now expects to exceed its MY 1988 projection by 0.7 mpg. The agency requests information to help it understand why the manufacturers exceeded prior projections, and whether the same types of factors are likely to result in the current MYs 1989–90 projections being exceeded.

10. To what extent do the manufacturers' current MYs 1989–90 CAFE projections reflect the effects of the 1986 fall in gasoline prices? What evidence is available concerning whether that drop in gasoline prices affected consumer demand during MYs 1986–88? In answering this question, please address the fact, noted above, that actual CAFE levels for MYs 1986–88 in some cases exceeded manufacturer projections. Is the effect of the 1986 fall in gasoline prices on consumer demand likely to be the same in MYs 1989–90 as for previous model years? If not, why?

11. What effect is import competition likely to have on the domestic manufacturers' CAFE levels for MYs 1989–90, as compared to recent model years? To the extent that there may be increased penetration of small import cars, how would this affect GM's and Ford's domestic CAFE values? To the extent that import manufacturers are importing larger vehicles, how would this affect GM's and Ford's domestic CAFE values? In addressing these questions, please discuss which of GM's and Ford's domestic models, as opposed to import models, compete with small and large import cars.

While the agency has not completed its analysis of manufacturer projections, it believes that the maximum feasible CAFE for MYs 1989–90, without unreasonable risk to any manufacturer with a major share of the market, is at least 26.5 mpg.

2. Possible Additional Actions To Improve MYs 1989–90 CAFE

In the past, the agency's rulemaking record has included discussions of technological improvements to the engine and transmission, as well as weight reduction, and aerodynamic and rolling resistance reduction as the prime sources for fuel economy improvements. From the entire fleet perspective, technological changes have been impressive: Over the past 10 years, the average passenger car weight has declined by 800 pounds, the average engine displacement has dropped from 280 CID to 162 CID, front-wheel drive has increased from 7 percent to 75 percent of the new car fleet, automatic transmissions with overdrive and/or lock-up torque converter clutches have increased from less than 1 percent to 85 percent and fuel-injected engines have increased from 5 percent to 72 percent.

For MYs 1989–1990, as indicated in the rulemaking record of this and prior CAFE rulemaking proceedings, there are a number of fuel-efficiency enhancing methods that are not fully utilized throughout the GM and/or Ford fleets. These include further weight reduction; front-wheel drive; four-speed automatic transmissions; engine improvements such as advanced electronic control of engines, reduced friction, and lean-burn fast-burn combustion; reduction of parasitic losses; and aerodynamic and rolling resistance reductions. All of these methods have previously been identified by the agency as feasible, and are partially utilized by the GM and Ford fleets, as well as by other manufacturers.

As a practical matter, it is not feasible for manufacturers at this point to implement significant technological changes for MY 1989 or MY 1990, due to lack of leadtime. This would not prevent the agency from maintaining the standard at 27.5 mpg, however, if it cannot make a determination of reasonable efforts, for the reasons discussed previously. The agency is analyzing whether additional, minor technological changes could be made during the 1989 model year or for MY 1990.

In considering whether further technological changes can be made for MYs 1989–90, NHTSA requests information or comments on the following questions:

12. What is the feasibility (bearing in mind both technological feasibility and economic practicability) of the various fuel-efficiency enhancing technologies, including but not limited to those identified in the agency's PRIA, for improving manufacturers' CAFE to or nearer to 27.5 mpg for MY 1989 and MY 1990? In answering the question, please address the potential penetrations of those technologies during this time period. If not feasible, why not? What are the leadtimes involved in making such technological changes?

13. To what extent, if any, would fuel economy improvements adversely affect consumer choice of vehicles or engines? If the record shows that it would adversely affect consumer choice, how should the agency take account of the effect of such restrictions in evaluating possible improvement of CAFE by additional technological means? Please address this issue with respect to the various available fuel-enhancing technologies, e.g., diesel engines, changing from rear-wheel drive to front-wheel drive, performance reductions, etc. and the legislative history indicating Congress' intent that consumer choice not be unduly limited. The agency seeks specific comment from the public on the trend toward increasing acceleration performance and whether manufacturers have any role in stimulating this trend through advertising or marketing strategies.

In previous rulemakings to lower the CAFE standard, the agency has evaluated the use of marketing efforts and/or product restrictions to improve CAFE. In the past, the agency has concluded that GM and Ford both have made efforts to promote the sales of fuel-efficient cars and determined that the manufacturers have undertaken extensive and significant marketing efforts to shift consumers toward their more fuel-efficient vehicles and options.

The agency also has stated previously that it believes that the ability to improve CAFE by additional marketing efforts is relatively small. As a practical matter, marketing efforts to improve CAFE are largely limited to techniques which either make fuel-efficient cars less expensive or less fuel-efficient cars more expensive. Moreover, the ability to increase sales of fuel-efficient cars largely relates to either increasing market share at the expense of competitors or pulling ahead a manufacturer's own sales from the future. A factor which makes it difficult for the domestic manufacturers to sell domestically-produced fuel-efficient cars is the growing competition of lower-priced small cars from newly developing countries such as Yugoslavia and South Korea.

Another consideration in this area is that the manufacturers' success in improving the fuel-efficiency of large cars has itself made it more difficult to sell smaller cars. The reason for this is that there are diminishing returns in terms of greater fuel economy from purchasing small cars as the fuel efficiency or larger cars increases. Similarly, as gasoline prices have declined, there are diminishing returns to the consumer from purchasing more fuel-efficient vehicles.

There is a problem with pulling ahead sales, as mentioned above, which consists of the manufacturer's CAFE for subsequent years being reduced. For example, if a manufacturer increases its MY 1988 CAFE by pulling ahead sales of fuel-efficient cars from MY 1989, the MY 1989 CAFE will decrease, compared with the level it would have been in the absence of any pull-ahead sales attributable to marketing efforts. For this reason, a manufacturer cannot continually improve its CAFE simply by pulling ahead sales.

The agency is not sure that manufacturers can improve significantly their CAFEs by increased marketing efforts. In a follow-up question to six manufacturers, the agency asked for details of specific marketing efforts undertaken during MYs 1987–88 to encourage the sale of more fuel efficient cars or engine options. NHTSA also asked for the financial and CAFE effects of these activities. Of the manufacturers asked, only one (Volvo) indicated that it did not spend its marketing money on promoting sales of its more fuel-efficient models. Volvo indicated that since its two carlines achieve similar CAFE, it is not an appropriate use of marketing funds. Volvo did indicate, however, that it provides some pricing incentives to encourage the sale of its more fuel-efficient vehicles (those with manual transmissions).

Ford and GM both presented specific information concerning their marketing programs. GM indicates that its total cost for numerous incentive programs for its fuel-efficient cars during MYs 1987–88 was over $2.0 billion. Ford indicates that its expenditures for its marketing program approaches $3.0 billion for the years 1982–1988. Ford also stated that its marketing support costs are disproportionately greater for its fuel-efficient models than its large-luxury models.

In considering whether marketing efforts can be used to improve CAFE beyond the levels projected by the manufacturers, NHTSA requests comments on the following questions:

14. Please quantify any financial or CAFE effects of marketing programs undertaken during MYs 1987–88 to encourage the sale of more fuel-efficient cars or engine options. (Describe the specific marketing programs undertaken.) What relevance, if any, does the MY 1987–88 experience have to what can be done for MYs 1989–90?

In looking at the potential methods for improving CAFE, the agency also has recognized in the past that manufacturers could improve their CAFE by restricting their product offerings, e.g., deleting less fuel-efficient car lines or dropping higher performance engines. However, the agency also acknowledges that, to the extent these product restrictions result in net sales losses, they could have a significant adverse economic impact on the industry and the economy as a whole, and could run counter to the statutory criterion of economic practicability and the Congressional intent that the CAFE program not unduly limit consumer choice.

VIII. Determining Maximum Feasible

As discussed above, section 502(a)(4) provides that the 27.5 mpg standard can be amended if the agency determines that some other standard represents the maximum feasible average fuel economy level. Such an amendment will be made only if the agency first makes a determination that the manufacturers made reasonable efforts to meet the standard. If the manufacturers' compliance plans were overtaken by unforeseen events, this determination includes consideration of the efforts made by manufacturers to offset the effects of those events. In determining maximum feasible, the agency considers the four factors of section 502(e): Technological feasibility, economic practicability, the effect of other Federal motor vehicle standards on fuel economy, and the need of the nation to conserve energy. Also, as discussed above, the agency takes industrywide considerations into account in determining the maximum feasible average fuel economy level.

A. Interpretation of Feasible

Based on dictionary definitions and judicial interpretations of similar language in other statutes, the agency traditionally has interpreted "feasible" to refer to whether something is capable of being done, taking into account the four statutory criteria mentioned above. The statute does not elevate any one of these criteria above the others, nor does it provide guidance to the agency in weighing any of these criteria more heavily than any others. For example, the agency's determination of the "maximum feasible" standard cannot be that level which is merely the maximum technologically feasible without regard to the economic practicability of such a level.

B. Economic Impacts of Not Amending the 27.5 mpg Standard

As the agency has stated in previous rulemakings, the determination of a maximum feasible level is not a cut and dry mathematical formula, but rather, a series of decisions based on interrelated trends, projections and factors. The agency's analysis of economic impacts is based on a preliminary assessment of GM's and Ford's capabilities, and is discussed in the PRIA.

In the past, the record of the rulemakings has shown that a CAFE standard set above those companies' capabilities could have an adverse effect on production, and hence employment, for either or both companies. For example, in the MY 1986 rulemaking, GM stated that it "must contemplate the possibility of restricting the production of many of [its] more popular models" (GM statement of August 8, 1985, public hearing). Similarly, in the MYs 1987–88 rulemaking, GM claimed that in order to remain in compliance, it "would have to both curtail drastically production of its fuel efficient cars and attempt to increase greatly its small car sales * * * [N]et GM production cuts could be more than 1 million cars" (GM submission of March 24, 1986).

While GM indicated in previous years that it "*must* contemplate" product restrictions (emphasis added) and "*would* have to curtail * * * production" (emphasis added), its statements in this rulemaking to date are less clear on this issue. For example, in its April 11, 1988, submission, GM only claimed that it "*may* need to restrict production" (emphasis added), and in its August 10, 1988, submittal GM stated that "product restrictions provide one means of assuring compliance." At the same time, that submission discussed other, technological means of complying with a 27.5 mpg standard. In summarizing its CAFE compliance planning, GM stated that with projections beneath 27.5 mpg, meeting the standard in a given year depends on "*either*" (a) product restrictions, with concomitant job losses to GM and its suppliers of 60,000 for MY 1989 and 110,000 in MY 1990 (with higher job loss estimates if minimum uncertainties are considered), "*or*" (b) recovery actions involving significant costs and marketing risks. (Emphasis added.) That company also stated that the latter approach *could* produce job impacts as a consequence of lower sales. (Emphasis added.) NHTSA believes that it is unclear from GM's submission the extent to which it believes jobs are at issue. This notice should not be viewed as an agency conclusion that the employment loss figures cited by GM, or any other employment losses, are likely. The agency will continue to analyze this issue during the comment period.

Ford indicates that it intends to comply with the statutory CAFE level of 27.5 mpg for MYs 1989–90 through the use of credits earned for exceeding the standard in other model years. Ford notes, however, that if sufficient credits are not available in the specified time period, there would be a significant increase in its compliance costs. The lack of lead-time as well as the lack of identifiable technology would force Ford to implement a more aggressive forced sales mix restrictions.

In analyzing possible employment impacts, NHTSA believes that it is obvious that some product decisions to restrict options might have a limiting effect on consumer choice, but would not necessarily have an adverse net employment effect. While the agency would need to consider whether product decisions to limit options would unduly limit consumer choice, the agency also believes it is important to keep separate in its analysis those product restrictions that would have adverse U.S. employment effects and those that might not. The agency also notes a trend in the industry (presumably unrelated to CAFE) to limit the number of consumer options on some models, generally by making previous options standard or only offering options in packages, in order to enchance competitiveness by introducing efficiencies and streamlining production. These decisions are described in business journals as related to efforts to increase market share which, if successful, should have a positive effect on U.S. employment. NHTSA requests commenters that address product restrictions to indicate whether the restrictions being discussed necessarily have an associated employment effect, and why.

As the agency analyzes possible employment impacts, it is attempting, among other things, to answer the following questions:

15. To what extent, if any, are U.S. jobs affected by the level of the MY 1989–90 CAFE standards and thus at issue in this rulemaking? If restricting products (with concomitant job losses) is one of a number of compliance options available to a manufacturer, how should the agency consider that option as compared to other options? To what extent would potential compliance actions other than restricting products (including "recovery" actions) affect jobs? Would such actions affect the competitiveness of the domestic industry? If so, would this have a negative impact on jobs? Would some potential compliance actions, such as marketing efforts to sell a greater number of U.S.-made smaller, more fuel-efficient cars, have a positive impact on U.S. jobs?

16. As discussed in connection with analyzing manufacturer CAFE projections, both GM and Ford have exceeded a number of the MYs 1986–88 CAFE projections they provided to the agency during the rulemakings for those model years. During those rulemakings, the manufacturers also provided estimates of job losses that would result from exceeding their projections. The agency requests information to help it understand how the manufacturers exceeded prior projections without apparent job losses, and whether the same types of factors are relevant to MYs 1989–90.

The agency also looks at the effect on gasoline consumption of a different CAFE standard. The per-vehicle present discounted value of lifetime fuel costs for a MY 1989 passenger automobile with a fuel economy level of 27.5 mpg is $3,237. If this same car achieved a fuel economy level of 27.0 mpg, it would add

$60 to the lifetime operating cost of the vehicle. If this same car achieved a fuel economy level of 26.5 mpg, an additional $62 would be added to the total operating cost of the vehicle. The financial significance to the consumer of these incremental changes in fuel economy has declined since the early 1970's as the fuel efficiency already achieved by the overall vehicle fleet has increased dramatically.

The precise magnitude of possible energy savings associated with retaining the 27.5 mpg standard versus establishing a lower standard is uncertain. The maximum hypothetical difference in gasoline consumption between GM and Ford achieving 26.5 mpg in MY 1989–90, as compared to those companies achieving 27.5 mpg, would be 1.8 billion gallons of gasoline over the life of the MYs 1989–90 fleets. This would represent a maximum yearly impact on U.S. gasoline consumption of 238 million gallons, or roughly 0.3 percent of total annual automobile consumption. In terms of U.S. petroleum consumption, it would amount to a maximum yearly increase of 0.09 percent.

The actual energy savings could be less if certain manufacturers were able to meet the 27.5 mpg standard only by restricting sales of their larger cars. In that event, consumers desiring such vehicles might tend to keep their older, larger cars in service longer, which generally are less fuel-efficient than their new counterparts; or they might purchase similar vehicles from manufacturers which did not face CAFE constraints; or they could purchase larger pick-up trucks and vans (which are less fuel-efficient, but not subject to the passenger automobile CAFE standards) to obtain the room, power and load-carrying capacity they desire. Those actions would have adverse (or at least neutral) effects on actual fuel consumption, which could offset in whole or part the theoretical energy savings associated with a higher passenger vehicle CAFE standard.

C. Consideration of Standards Above GM's and/or Ford's Capability

In the MY 1987–88 rulemaking, NHTSA considered, as part of taking industrywide considerations into account, whether a standard could or should be set at levels above the capabilities of GM and/or Ford. The agency concluded that since GM then produced more than 40 percent, and Ford approximately 18 percent, of all cars sold in the U.S., CAFE standards set at the level of the least capable of these manufacturers represents an appropriate balancing of "the benefits to the nation of a higher average fuel economy standard against the difficulties of individual manufacturers." NHTSA also stated that given GM's and Ford's large market shares, it believed that a standard set at a level above either company's capability would be inconsistent with taking industrywide considerations into account.

The MYs 1987–88 decision was made in the context of a determination that both GM and Ford had made reasonable efforts to achieve 27.5 mpg CAFE for those two model years. As discussed above, NHTSA is still in the process of analyzing whether it can make such a determination for GM and Ford for MYs 1989–90. There is thus a possibility that the agency will conclude that one manufacturer made reasonable efforts to achieve 27.5 mpg and that the other did not. Should this occur, it is also possible that an approach of not setting a standard at a level above either company's capability could result in the company which did *not* make reasonable efforts driving the level of the standard downward.

As discussed above, the agency has previously concluded that reducing a standard notwithstanding the absence of reasonable efforts by the industry would be an abuse of discretion. Moreover, the Court of Appeals has stated that lowering the standard whenever the larger manufacturers assert current inability to meet the standard would, without doubt, completely vitiate the statutory scheme. NHTSA's approach of analyzing reasonable efforts for purposes of deciding whether to exercise its discretion to amend a standard and then following its traditional approach of analyzing maximum feasibility as of the time of the amendment for purposes of setting the new standard produces results clearly consistent with the statutory scheme so long as either all, or none, of the larger manufacturers have made reasonable efforts to achieve 27.5 mpg CAFE for a particular model year. NHTSA notes, however, about the possible result where the capability and reasonable efforts of one of the larger manufacturers "opens the door" for setting a new standard, and the lower capability of another larger manufacturer which has not made reasonable efforts drives the level of the standard downward. The agency requests comments on the following question:

17. If the capability and reasonable efforts of one of the larger manufacturers justifies an amendment to lower the 27.5 mpg standard, and another larger manufacturer which may not have made reasonable efforts to achieve 27.5 mpg CAFE for the model year in question (whether because it decided to utilize the statute's flexibility related to credits or for any other reason) has a lower capability which could drive the level of the standard downward, how should the agency consider this issue in setting the new standard at the "maximum feasible average fuel economy level"?

IX CEI Petition

CEI's petition requested, based on safety considerations, that NHTSA set the MY 1989–90 standards at a "nonconstraining" level, i.e., a level at or below the CAFE that manufacturers would achieve in the absence of any regulatory program. The petitioner argued that larger cars are generally more crashworthy than smaller cars, and that downsizing is a major means by which carmakers improve the fuel economy of their product. CEI argued that to the extent that a particular model year's CAFE standard mandates a level of fuel economy above that which would otherwise be achieved, it diminishes the crashworthiness of the new car fleet. The petitioner cited a report by Robert W. Crandall of the Brookings Institution and John D. Graham of the Harvard School of Public Health in support of its contention.

NHTSA believes that setting CAFE standards deliberately low enough to be "nonconstraining," as requested by CEI, would be inconsistent with EPCA's requirements and thus outside the agency's legal authority. As discussed above, in 1975, Congress set the 27.5 mpg standard for MY 1985 and subsequent years by statute. The 27.5 mpg standard represented a long-term goal, requiring manufacturers to essentially double their CAFE. While the Act provides NHTSA with authority to amend the standard for particular model years, any amended standard must be at the "maximum feasible" level. Clearly, Congress intended the CAFE program to have a substantial impact on the cars being produced.

While NHTSA shares CEI's objection to the CAFE program (albeit for different reasons), the agency cannot unilaterally alter or ignore the statute. As noted earlier, NHTSA has asked Congress to repeal the law; but until then, we must administer it as written, despite our policy views. Any methodology of setting standards deliberately to be at or below the level that would be achieved in the absence of the CAFE program, whether for safety considerations or any other reason, would violate the requirement for maximum feasible standards and vitiate the statutory scheme.

On the other hand, NHTSA believes that it is appropriate to consider safety in deciding whether to exercise its discretion to amend CAFE standards and also in determining maximum feasible fuel economy. NHTSA notes that in proceeding to the final step in its selection of the level of the MY 1981–84 passenger car CAFE standards, it dropped from further consideration the highest schedule of standards, i.e., the one based on the use of diesels, mix shifts and certain other actions. The agency did so in part because it desired further information on health effects of diesel particulates. 42 FR 33454–45.

NHTSA also notes that it has been argued that some recent product decisions that tend to *lower* CAFE may have adverse safety impacts. These observers have cited such things as recent significant increases in acceleration and performance of certain vehicles. In analyzing possible safety impacts, the agency must, of course, consider possible impacts in both directions.

In analyzing this issue, the agency requests information or comments on the following question:

18. Would lower passenger car CAFE standards for MYs 1989–90 have any impact, positive or negative, on safety? Why? The agency is particularly interested in comments from manufacturers as to whether and how they would change their product plans in response to a lower standard, i.e., whether weight would be added, whether additional safety features would be added and, if so, for which models; the quantitative impact such features would have on safety; and why the 27.5 mpg standard prevents or discourages them from offering such features. Are there product decisions that are adverse to safety that would be encouraged by a lower standard?

X. Comment Period

NHTSA is providing different comment periods for the proposed MY 1989 and MY 1990 standards. An abbreviated comment period is provided for the proposed MY 1989 standard, while a 60 day period is provided for the proposed MY 1990 standard.

The comment period is shortened for MY 1989, due the limited remaining time for amending that standard. NHTSA notes, however, that on March 16, 1988, it published a request for comments relating to one of the petitions requesting a reduction in the MY 1989–90 CAFE standards. That notice specifically sought information concerning manufacturer efforts at meeting the CAFE standards, manufacturer product plans, and projected CAFE levels. Thus, the public has had a previous opportunity to submit comments relating to a possible reduction in the MY 1989 CAFE standard, and has been aware for many months of the possibility of rulemaking in this area.

NHTSA also recognizes, however, that there may be some persons or organizations commenting for the first time. We encourage every interested person to comment, whether or not the submitter responds to all of the questions posed. The agency requests that the commenter identify the numbered question he or she is addressing. Each comment will be reviewed and considered by the agency.

NHTSA has stated previously that amendments reducing a standard for a particular model year may be made until the beginning of the model year, but not after that time. See 49 FR 41250, 41254–6 (October 22, 1984). While the agency has not established a particular date as the beginning of the model year, it has stated that the model year begins in the fall of the preceding calendar year. Moreover, in *In Re Center for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986), the Court of Appeals stated that "the model year is traditionally thought to start approximately October 1st." That court also concluded that in amending the MY 1985 light truck CAFE standards on October 16, 1984, the agency failed to amend the standards before the start of that model year. In light of this decision, NHTSA believes that in order to be timely, any decision regarding the MY 1989 standard should be made and issued by the beginning of the model year, ordinarily thought to be the beginning of October.

EPCA does not establish a specific minimum notice period. Accordingly, NHTSA has established a reasonable comment period, based on the circumstances. The agency believes that the comment period for MY 1989 is sufficiently long to provide a full opportunity for meaningful participation by the public, and that a longer period would make it difficult or impossible to make a final decision in a timely manner. Accordingly, the agency finds good cause for the shortened comment period.

XI. Public Meeting

A public meeting will be held on September 14, 1988, in Washington, DC, at 9:00 a.m. at the U.S. Department of Commerce Auditorium, 14th Street and Constitution Ave., NW., Washington, DC 20591. The agency invites interested members of the public to participate in this meeting and to comment on the full range of issues raised by this proposal, and specifically to respond to the question of whether manufacturers have made reasonable efforts to meet the 27.5 mpg CAFE standard and to the question of the maximum feasible level for MY 1989 and MY 1990.

No opportunity will be afforded the public to directly question participants in the meetings. However, the public may submit written questions to the panel of Federal officials for the panel to consider asking of particular participants. The presiding officials reserve the right to ask questions of all persons making oral presentations.

Persons wishing to make oral presentations at the public hearing should contact Mr. James Jones, Office of Market Incentives, NHTSA, 400 Seventh Street SW., Washington, DC 20590, (202) 366–4793, by September 9, 1988, so that time limitations (if necessary) and the need for any special equipment, such as projectors, can be discussed and final arrangements can be made. Persons whose presentations will include slides, motion pictures, or other visual aids should submit copies of them for the record at the meeting. Oral presentations will be limited to between 5 and 15 minutes, depending on the number of witnesses. If the number of requests for oral presentation exceeds the available time, the agency may ask prospective witnesses having similar views or belonging to similar types of groups or occupations to combine their presentations.

Persons making oral presentations are requested, but not required, to submit 25 written copies of the full text of their presentation to Mr. James Jones no later than the day before the hearing. If time permits, persons who have not requested time, but would like to make a statement, will be afforded an opportunity to do so at the end of the day's schedule. Copies of all written statements will be placed in the docket for this notice. A verbatim transcript of the public hearing will be prepared and also placed in the NHTSA docket as soon as possible after the hearing. A schedule of the persons making oral presentations at the hearing will be available at the designated meeting area at the beginning of the public hearing.

XII. Written Comments

Comments are requested in three specific areas: reasonable efforts, jobs, maximum feasible capability, and safety effects of the CAFE program. The agency has discussed in more detail what it needs in each of the preamble sections dealing with these issues.

Interested persons are invited to submit comments on the proposal, regardless of whether they also present oral statements at the September 14 public meeting. It is requested but not required that 10 copies be submitted.

All comments must be limited not to exceed 15 pages in length (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15-page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. A request for confidentiality should be accompanied by a cover letter setting further the information specified in the agency's confidential business information regulation (49 CFR Part 512).

All comments received before the close of business on the comment closing date indicated in the **DATES:** section of this preamble will be considered, and will be available for examination in the docket at the above address both before and after that date. Because of the short time available to decide whether to issue a final decision for MY 1989, the agency does not expect to be able to consider any late comments. For MY 1990, comments filed after the closing date will be considered to the extent possible. Rulemaking action may proceed at any time after the comment due date. Any comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. The NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

XIII. Impact Analyses

A. Economic Impacts

The agency considered the economic implications of the proposed amendment and determined that the proposal is major within the meaning of Executive Order 12291 and significant within the meaning of the Department's regulatory procedures. The agency's detailed analysis of the economic effects is set forth in a Preliminary Regulatory Impact Analysis, copies of which are available from the Docket Section. The contents of that analysis are generally described above.

B. Environment Impacts

The agency has analyzed the environmental impacts of the proposed amendment to the 1989–1990 model year passenger automobile average fuel economy standards in accordance with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* Copies of the Environmental Assessment (EA) are available from the Docket Section. The agency has tentatively concluded that no significant environmental impact would result from the execution of this rulemaking action. The agency notes, for the first time in this EA, however, that part of its analysis should include the possible effects of the potential increase in carbon dioxide (CO_2) build-up as the result of action lowering the standard (build-up is known as the "greenhouse" effect).

C. Impacts on Small Entities

Consistent with the provisions of the Regulatory Flexibility Act, the agency has considered the impacts this rulemaking would have on small entities. I certify that this action would not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required for this action. No passenger car manufacturer, if subject to the proposed rule would be classified as a "small business" under the Regulatory Flexibility Act. In the case of small businesses, small organizations, and small governmental units which purchase passenger cars, adoption of the proposed rule would not affect the availability of fuel efficient passenger cars or have a significant effect on the overall cost of purchasing and operating passenger cars.

D. Impact on Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

E. Department of Energy Review

In accordance with section 502(i) of the Cost Savings Act, the agency submitted this proposal to the Department of Energy for review. There were no unaccommodated comments.

List of Subjects in 49 CFR Part 531

Energy conservation, Fuel economy, Gasoline, Imports, Motor vehicles.

In consideration of the foregoing, 49 CFR Part 531 would be amended as follows:

PART 531—PASSENGER AUTOMOBILE AVERAGE FUEL ECONOMY STANDARDS

1. The authority citation for Part 531 would continue to read as follows:

Authority: 15 U.S.C. 2002, delegation of authority at 49 CFR 1.50.

§ 531.5 [Amended]

2. The table in § 531.5(a) would be amended by revising the fuel economy standards specified for MY 1989–90 to the levels determined by the agency to be the maximum feasible average fuel economy level, based on the considerations discussed above.

Issued: August 25, 1988.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 88–19699 Filed 8–26–88; 8:45 am]

BILLING CODE 4910–59–M

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws.**

Last List August 17, 1988

CFR CHECKLIST

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An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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1, 2 (2 Reserved)	$10.00	Jan. 1, 1988
3 (1987 Compilation and Parts 100 and 101)	11.00	[1] Jan. 1, 1988
4	14.00	Jan. 1, 1988
5 Parts:		
1-699	14.00	Jan. 1, 1988
700-1199	15.00	Jan. 1, 1988
1200-End, 6 (6 Reserved)	11.00	Jan. 1, 1988
7 Parts:		
0-26	15.00	Jan. 1, 1988
27-45	11.00	Jan. 1, 1988
46-51	16.00	Jan. 1, 1988
52	23.00	Jan. 1, 1988
53-209	18.00	Jan. 1, 1988
210-299	22.00	Jan. 1, 1988
300-399	11.00	Jan. 1, 1988
400-699	17.00	Jan. 1, 1988
700-899	22.00	Jan. 1, 1988
900-999	26.00	Jan. 1, 1988
1000-1059	15.00	Jan. 1, 1988
1060-1119	12.00	Jan. 1, 1988
1120-1199	11.00	Jan. 1, 1988
1200-1499	17.00	Jan. 1, 1988
1500-1899	9.50	Jan. 1, 1988
1900-1939	11.00	Jan. 1, 1988
1940-1949	21.00	Jan. 1, 1988
1950-1999	18.00	Jan. 1, 1988
2000-End	6.50	Jan. 1, 1988
8	11.00	Jan. 1, 1988
9 Parts:		
1-199	19.00	Jan. 1, 1988
200-End	17.00	Jan. 1, 1988
10 Parts:		
0-50	18.00	Jan. 1, 1988
51-199	14.00	Jan. 1, 1988
200-399	13.00	[2] Jan. 1, 1987
400-499	13.00	Jan. 1, 1988
500-End	24.00	Jan. 1, 1988
11	10.00	July 1, 1988
12 Parts:		
1-199	11.00	Jan. 1, 1988
200-219	10.00	Jan. 1, 1988
220-299	14.00	Jan. 1, 1988
300-499	13.00	Jan. 1, 1988
500-599	18.00	Jan. 1, 1988
600-End	12.00	Jan. 1, 1988
13	20.00	Jan. 1, 1988
14 Parts:		
1-59	21.00	Jan. 1, 1988
60-139	19.00	Jan. 1, 1988
140-199	9.50	Jan. 1, 1988
200-1199	20.00	Jan. 1, 1988
1200-End	12.00	Jan. 1, 1988
15 Parts:		
0-299	10.00	Jan. 1, 1988
300-399	20.00	Jan. 1, 1988
400-End	14.00	Jan. 1, 1988
16 Parts:		
0-149	12.00	Jan. 1, 1988
150-999	13.00	Jan. 1, 1988
1000-End	19.00	Jan. 1, 1988
17 Parts:		
1-199	14.00	Apr. 1, 1988
200-239	14.00	Apr. 1, 1988
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18 Parts:		
1-149	15.00	Apr. 1, 1988
150-279	12.00	Apr. 1, 1988
280-399	13.00	Apr. 1, 1988
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19 Parts:		
1-199	27.00	Apr. 1, 1988
200-End	5.50	Apr. 1, 1988
20 Parts:		
1-399	12.00	Apr. 1, 1988
400-499	23.00	Apr. 1, 1988
500-End	25.00	Apr. 1, 1988
21 Parts:		
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170-199	16.00	Apr. 1, 1988
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600-799	7.50	Apr. 1, 1988
800-1299	16.00	Apr. 1, 1988
1300-End	6.00	Apr. 1, 1988
22 Parts:		
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23	16.00	Apr. 1, 1988
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§§ 1.61-1.169	23.00	Apr. 1, 1988
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§§ 1.301-1.400	14.00	Apr. 1, 1988
§§ 1.401-1.500	24.00	Apr. 1, 1988
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§§ 1.1001-1.1400	16.00	Apr. 1, 1988
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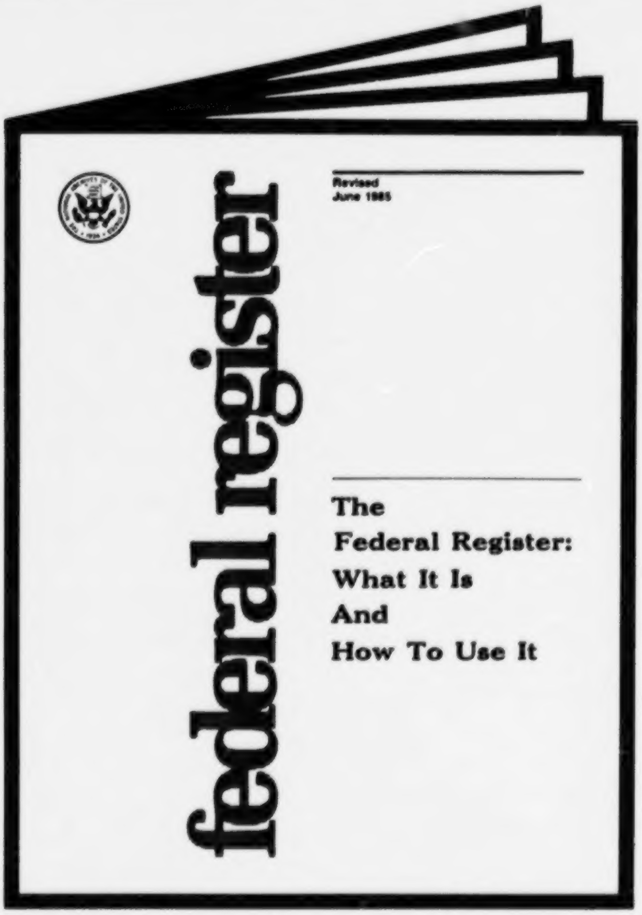
[2] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1987. The CFR volume issued January 1, 1987, should be retained.

[3] No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1988. The CFR volume issued as of Apr. 1, 1980, should be retained.

[4] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[5] No amendments to this volume were promulgated during the period July 1, 1986 to June 30, 1988. The CFR volume issued as of July 1, 1986, should be retained.

[6] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.



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